Supreme Court, U.S.
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In The

Supreme Court of the United States

LARS P. E. BILDMAN,

Petitioner,

v.

ASTRA USA, INC., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of Massachusetts

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the First Amendment requires a defamed individual to meet the heavy burden imposed on limited purpose public figures because the subject matter of the defamatory speech related to, *inter alia*, sexual harassment in the workplace and, beside numerous failed attempts to get media to present Petitioner's side of the story in one press release, counsel for the defamed individual denied and rebutted such accusations.

2. Whether the First Amendment guarantees full media defendant protection to a foreign multinational drug company and its non-resident executives when, assisted by professional "pretrial impact" consultants, executing a media strategy designed to influence potential jurors and judges in anticipation of trial.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the following parties appeared below as plaintiffs/ third-party defendants: Astra AB; Dr. Hakan Mogren and Carl-Gustav Johansson.

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OPINIONS BELOW

The opinion of the Supreme Judicial Court of Massachusetts (App., *infra*, 1a-50a) is reported at 455 Mass. 116, 914 N.E.2d 36 (Mass. 2009). The trial court's Finding of Fact, Rulings of Law and Order on the Equitable Forfeiture Claim of Astra USA, Inc. Against Lars Bildman (App., *infra*, 51a-73a) is unreported in the New England reports but appears at Nos. CIV. A.1998-580C, CIV. A.1999-1942G, 2001 WL 771185. The final judgment of the trial court is unreported (App., *infra*, 74a-79a).

JURISDICTION

The judgment of the Supreme Judicial Court of Massachusetts was entered on October 5, 2009. A timely petition for rehearing was denied on December 3, 2009 (App., *infra*, 1a). This Petition, filed within 90 days of that denial, is timely, and the jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the

> freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution Clause 5 of the Fourteenth Amendment:

> The Congress shall have the power to enforce this article by appropriate legislation.

Title 28 United States Code, Section 2106 (Determination)

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT OF THE CASE

The growing inconsistency among lower courts concerning who can become a limited purpose public figure is ripe for clarification. Federal and state courts increasingly ignore this Court's precedent "making the determination of a defamation plaintiff's status an uncertain process differing from state to state and court to court." 1 Robert D. Sack, *Sack on Defamation*, §5.3.6, 5-39 (3d ed. 2004). The lower

court's ruling is not only unconstitutional but against national interests since it presents corporations with the unrestricted ability to silence any individuals under their authority by allowing such defamation defendants to create their own defense through the alleged libel, which is squarely against this Court's instructions. *See Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979). In addition, this case raises a related issue of great importance so far passed over by this Court, but which today has extraordinary public ramifications – the vesting in nonmedia defendants the same immunity against defamation suits as the Constitution guarantees a media defendant. The lower court's holding reflects the constitutional interpretation that nonmedia defendants are guaranteed the same immunities as media defendants. If followed by other courts, this would effectively silence corporate executives, who would otherwise voice concerns about corporate high-risk financial policies and fiscally unhealthy practices going flatly against national interests in recovering from the current financial recession. Faced with the threat of corporate smear campaigns against them and without redress, executives with unpopular views would be silenced; corporate openness, internal criticism, and self-regulation would fade away in times when needed the most.

Under the undisputed facts in this case, the First Amendment does not allow an unknown private person to be treated as a public figure when the subject matter of the alleged defamatory statements

did not relate to an issue of public controversy but merely to one of general interest[1] and concern[2] and was not the result of that private person's voluntary participation but instead the result of public accusations made by Respondents, assisted by professional "pre-trial impact" consultants, outside of that private person's control.

I. Background Factual Summary

Petitioner incorporates Background and Factual Summary by reference, (App., *infra*, 4a-14a, 52a-66a), with the following additions and clarifications. In the appeal below, Petitioner referenced the record only insofar as related to the issues appealed and refrained from commenting on Respondents' representation of the factual background relying on the appellate court to conduct its own independent review of the correctness of Respondents' citations of the trial court record. The court below, instead of conducting its own inquiry, relied on Respondents' adherence to ethical and professional rules of conduct when referencing the record. The resulting "Factual Background" section is a misrepresentation of the circumstances of the dispute between Petitioner and Respondents. Rather, it is a self-serving argument for

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[1] "[T]he parties dispute . . . reflect[s] other issues of general interest." (App., *infra*, 47a n.43).

[2] "[T]he issue . . . is a matter of general **concern**." (App., *infra*, 47a) (emphasis added).

Respondents with seminal events and facts left out, creating a distorted chain of events.

There is no record of Petitioner's making his secretary's employment conditioned on sexual favors or of her ever filing a claim against Petitioner. On the contrary, in her deposition Ms. Jutras-Feetham states, "He [Bildman] didn't pressure me, he just did. He didn't force me, you know what I mean? He didn't talk me into it." (R. Vol. XV, at R06705.018). Nor is there any record of Petitioner hiring prostitutes. In fact, the trial judge warned and instructed Respondents never to use the word "prostitute" in the courtroom. Moreover, the nexus of the conflict between Petitioner and Respondents was Petitioner's disapproval of the parent company's actions in disregard of F.D.A. rules including: 1) in a New Drug Application attempting to pass off test results from a product other than that for which it was seeking approval; 2) actively concealing from Petitioner and the F.D.A. severe fetus defects in the pregnant monkey on a drug Petitioner was preparing for human clinical trials in the United States; and 3) that dose ranges on batches of products shipped from Sweden to the United States did not meet specifications. (App., *infra*, 63a). Likewise, Petitioner refused to honor Respondents' request that he deliver false information to the investment community at a stockholder road show at the Plaza Hotel in New York City in or about August 1995 about a severely delayed new product launch. Petitioner also refused to have Astra USA pay out tax-free consulting fees to business

friends of the parent company's CEO, Swedish and American alike, for work never wanted or delivered.

Further, Respondents approved the publication of the *Business Week* article after the magazine's editorial board had turned it down.[3] (R. Vol. II, at R00581-82). In fact, Respondents caused the defamatory publication by firing Petitioner, cancelling his scheduled follow-up meeting with the magazine and calling *Business Week* to a meeting where Respondents authorized the publication of the article as well as issued a press release launching its smear campaign against Petitioner. (R. Vol. II, at R00582-83).[4] In addition, Respondents' professional media campaign (R. Vol. III, at R00910-15), published or caused to be published untrue allegations of Nazi sympathies including a swastika on Petitioner's office wall and *Mein Kampf* in his office bookshelves. (R. Vol. III, at R00771). Likewise, Respondents also caused the publication of the untrue statement that Petitioner had pleaded guilty to tax fraud when his plea was done under 28 U.S.C. §7206(1), a perjury statute without elements of fraud or underpayment of taxes. (R. Vol. III, at R00909). Still, the facts relevant to the issues raised in this petition are correct and undisputed.

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[3] The court below left this fact unnoticed.

[4] Likewise, the court below left this fact unnoticed.

II. Trial Court Litigation

Respondents brought action against its former chief executive officer, Petitioner, alleging breach of fiduciary duty, seeking to recover compensation paid to him during period of disloyalty and amounts paid by employer to investigate wrongdoing including settlement amount paid to the E.E.O.C. Petitioner counter-claimed, seeking attorney fees under employment agreement and alleging claims for libel. The trial court entered summary judgment in favor of Respondent on Petitioner's attorney-fee and libel claims. Additionally, after a jury trial at law and a subsequent bench trial in equity, the court entered final judgment denying Respondent's claim for amounts paid to investigate Petitioner including amounts paid to the E.E.O.C. and confirmed the dismissal of Petitioner's claims for libel holding that he was a limited purpose public figure. (App., *infra*, 75a-78a).

III. Appeal Below

After transferring the case *sua sponte* from the Appeals Court, the Supreme Judicial Court of Massachusetts held that:

(1) Petitioner was required to forfeit all compensation paid to him during the period of disloyalty;

(2) Since Respondent Corporation is incorporated in the State of New York, Massachusetts

equity doctrine did not apply to reduce the amount of compensation forfeited.

(3) Respondent, Astra USA, was not entitled to recover costs of investigation;

(4) Petitioner was not entitled to recover attorney fees under employment agreement; and

(5) Petitioner was a limited purpose public figure required to prove that Respondent acted maliciously in making allegedly false statements about Petitioner. (App., *infra*, 49a-50a).

In his appeal to the Supreme Judicial Court of Massachusetts, and in his petition for rehearing, Petitioner argued against the trial court's ruling on constitutional grounds. (Brief of Appellee Bildman pp. 34-40 (relying on the seminal trilogy of cases following *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)); *see also Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984) (holding that the question of First Amendment protection in defamation cases is always decided on grounds of federal constitutional law). Respondents relied on obscure and unconstitutional state law and in addition argued orally for a "bad behavior doctrine" similar to one adopted in Alaska. *See Alaska Statebank v. Fairco*, 674 P.2d 288 (Alaska 1983). Under this "voluntary bad behavior doctrine," Petitioner, so Respondents argue, became a public figure through his alleged "bad behavior" that lead Respondents to publish defamatory statements which caught the attention of media. (App., *infra*, 47a-48a n.43).

The Supreme Judicial Court of Massachusetts, in a shallow and summary analysis, agreed with Respondents and held that Petitioner was a limited purpose public figure. (App., *infra*, 46a-49a). Although announcing its analysis as a two-part *Gertz* test, (App., *infra*, 46a-49a), the court ignored all instructions given in *Gertz* and its progeny as to the existence of a public controversy and the characteristics of a limited purpose public figure. *See Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 166-69 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351-52 (1974). Specifically, the court did not identify a public controversy, but merely pointed to issues of general interest and concern. Instead of following this Court's precedent, the court below relied upon three obscure cases, none having ever received one positive citing and one pre-*Gertz/Rosenbloom*-era case not cited since 1973.[5] (*Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). (App., *infra*, 46a-49a).

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[5] *Bowman v. Heller*, 420 Mass. 517, 523 n.7, 651 N.E.2d 369, 374 n.7 (Mass. 1995); *Jones v. Taibbi*, 400 Mass. 786, 797-98, 512 N.E.2d 260, 267-68 (Mass. 1987); *Alaska Statebank v. Fairco*, 674 P.2d at 294; *Tripoli v. Boston Herald-Traveler Corp.*, 359 Mass. 150, 156, 268 N.E.2d 350, 353-54 (1971).

IV. More Than Thirty Years Ago This Court Instructed Lower Courts on Standard for the Determination of Limited Purpose Public Figure Status Leaving Open the Equally Important Question of Whom the Constitution Guarantees Media Defendant Protection

A. The Reach of the Constitutional Protection of Media Defendants Remains Undefined

Thirty years ago, when faced with the issue of the reach of the constitutional protection of media defendants, this Court chose not to consider whether the *New York Times* (*New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)) standard applied to an individual defendant rather than to a media defendant. *Hutchinson*, 443 U.S. at 134 n.16 (dismissing the actual malice standard on defamation plaintiff's private person status). Far before *Hutchinson*, in the 1938 *Lovell* decision, the Court touched upon the issue of defendant's status defining one aspect thereof by instructing that "[t]he liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets." *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938).

In *Babbitt*, decided weeks prior to *Hutchinson*, the Court specifically pointed out that its ruling had no bearing on "the role of the First Amendment in suits by private parties against nonmedia defendants." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 309 n.16 (1979). Then, after *Hutchinson*, the Court again avoided the question by clarifying that

the holding did not require it to consider "what standards would apply if the plaintiff sues a nonmedia defendant." *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 779 n.4 (1986). Again in *Milkovitch*, the Court, quoting *Hepps*, "reserved judgment on cases involving nonmedia defendants." *Milkovitch v. Lorain Journal Co.*, 497 U.S. 1, 20 n.6 (1990).

Thus, although for forty years this Court has recognized the issue as one that at some point in time needs clarification, it has avoided the issue by deciding the question at hand on other grounds. Petitioner respectfully suggests that the time is ripe, and that it is of compelling interest for this Court now to resolve the issue by granting this Petition.

B. Constitutional Characteristics of a Limited Purpose Public Figure

Since *Gertz*, the seminal issue in the majority of defamation cases has been the designation of otherwise private individuals as limited purpose public figures. In *Gertz* and the three cases following it over the next five years, this Court developed a two-part inquiry procedure determining when a private person is transformed into a limited purpose public figure by analyzing: (1) whether the issue of the alleged defamatory statements is one of public controversy; and (2) whether the nature and extent of defamation plaintiff's prior participation in that very controversy was such as to warrant public figure status. *Gertz*, 418 U.S. at 351.

Prior to *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), courts strongly favored the interest in protecting an individual's reputation on behalf of the First Amendment's protection of free speech. The *New York Times* Court set a new standard significantly changing this balance. Hereinafter, in order for "public officials" to prevail in defamation suits, they must establish "actual malice" with convincing clarity. *Id.* at 285-86.

Following *New York Times*, the Court initially expanded the group of individuals to be included under the "actual malice standard." The Court in *Rosenblatt v. Baer*, 383 U.S. 75, 85-86 (1966), designated as "public official" at least all those government employees "who have, or appear to have, substantial responsibility for or control over the conduct of governmental affairs." This Court next in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 162 (1967) extended the area subjected to the "actual malice" standard beyond "public officials" to include non-official "public figures" like a famous football coach. Finally, in *Rosenbloom*, the "actual malice" area reached its climax. The Court subjected to the "actual malice test" non-public private individuals whose speech involved issues of public or general concern. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. at 43-44.

The constitutional balance proposed by the *Rosenbloom* plurality was unequivocally rejected by the Court in *Gertz*, 418 U.S. at 346. There, the Court instructed that the extension of the *New York Times* standard to include private persons would abridge

such persons' interests "to a degree that we find unacceptable." *Id.* The Court next introduced a classification system for lower courts to follow, instructing that there are three major classes of public figures. The third, and for this petition relevant class, consists of persons who "have thrust themselves to the forefront of a particular public controversy[6] in order to influence the resolution of the issues involved." *Id.* at 345, 351.

This Court's opinions provide two justifications for advancing First Amendment protections to defamatory speech against public officials, general, and limited purpose public figures. First, public officials and figures are less deserving of protection from defamatory speech because they have voluntarily exposed themselves to an increased risk of injury from such speech. *See Wolston*, 443 U.S. at 164; *Gertz*, 418 U.S. at 345. Second, public figures are less vulnerable to injury from defamatory speech because through their prior participation in the controversy intended or calculated to influence its outcome, they have already acquired an effective access to the media. Thus, they are more able than private persons to effectively counter, criticize, and expose falsehoods. *Gertz*, 418 U.S. at 344 (emphasis added).

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[6] Without providing an express definition of its word of choice, the Court here exchanged the words "interest" and "concern" for the word "controversy," which in plain English bears a significantly different and narrower meaning as clarified by the Court in subsequent cases.

As recognized by a shrinking majority of federal and state appeals courts, the three above-cited Supreme Court cases following *Gertz* have further refined, clarified, and narrowed the group of people who under the Constitution can be transformed from private persons to public figures.[7] Specifically, those cases have focused on the above third class and categorized those persons as "limited purpose public figures." *See generally Wolston*, 443 U.S. 157; *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976). Determining whether a defamation plaintiff is a limited purpose public figure, this Court further developed the *Gertz* two-part test: First, did a particular public "controversy" lead to the alleged defamation, and second, was the nature and extent of the plaintiff's participation in that particular controversy such as to justify public figure status. *See Wolston*, 443 U.S. at 166-69; *Hutchinson*, 443 U.S. at 134-36; *Firestone*, 424 U.S. at 453-55.

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[7] "[I]n the aftermath of *Gertz*, the Supreme Court undertook a series of refinements of the 'limited' public figure, consistently giving the term an application more restricted in scope than the simple word 'public' might suggest as a matter of popular colloquial usage." *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1553 (4th Cir. 1994) (quoting 1 Rodney A. Smolla, *Law of Defamation*, §2.08 at 2-23 (1993)).

C. What Constitutes a Public Controversy Under the First Amendment

In the first of this trilogy of precedential cases, *Firestone*, the controversy was the divorce of Mary Allen Firestone from the heir of the Firestone family, Russell Firestone. The couple exchanged fierce accusations of sensational character, which the media heavily reported, but this Court refused "to equate 'public controversy' with all controversies of interest to the public." *Firestone*, 424 U.S. at 454. Thus, although a dispute is litigated and creates heavy media attention, it is not sufficient to render the dispute a public controversy. *Id.* at 453-57.

Next, in *Hutchinson*, a researcher who had received federal funding for animal studies sued United States Senator Proxmire for defamation after Proxmire had published defamatory statements about the value of Hutchinson's research. Proxmire argued, *inter alia*, that Hutchinson became a limited purpose public figure for the limited purpose of comment on his receipt of federal funding for research projects when defending himself in the media. The Court clarified the nature of a public controversy through its finding that "[r]espondents have not identified such a particular controversy; at the most, they point to concern about general public expenditures . . . but [that] is not enough to make Hutchinson a public figure." *Hutchinson*, 443 U.S. at 135. Further, the Court warned that the use of subject-matter classification to determine whether the issue is one of public

controversy "too often results in an improper balance between competing interests in this area." *Id.*

In *Wolston*, the last of the public figure trilogy, the plaintiff sued the author and publisher of a book that falsely identified him as a Soviet agent. The *Wolston* Court overturned the lower court's finding that Wolston was a limited purpose public figure having thrust himself into the forefront of a particular public controversy and held that the controversy, Soviet espionage, was not a public controversy. *Wolston*, 443 U.S. at 160. Although in *dicta*, Justice Rehnquist offered an indication that an element of divisiveness is necessary to turn an interest or concern into a controversy. *Id.* at 167 n.8.

No defamatory action has received more media attention than the child custody dispute in *Foretich*, 37 F.3d at 1455. The custody battle, *inter alia*, raised several substantial questions for public debate, which ultimately prompted Congress and the President to act through federal legislation. Thus, the court held that the custody battle became a public controversy. *Id.*

Moreover, in all post-*Gertz* cases, this Court has made it unequivocally clear that the public controversy must pre-exist the defamation and that to become a limited purpose public figure the defamation plaintiff must have thrust himself into that controversy prior to the defamatory statements. *Wolston*, 443 U.S. at 166; *Firestone*, 424 U.S. at 134-35 (emphasis added). Furthermore, a public controversy

must be a real dispute, the outcome of which affects the public or some segment of it in an appreciable way. *See, e.g.*, *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1296 (D.C. Cir. 1980) (quoting *Firestone*, 424 U.S. at 454-55).

D. Constitutional Requirements for the Nature and Extent of Participation in a Public Controversy to Transform a Private Person into a Public Figure

In *Gertz*, the Court stated that "[t]he first remedy of any victim of defamation is self-help using available opportunities to contradict the lie or correct the error and thereby minimize its adverse impact on reputation." *Gertz*, 418 U.S. at 344. The Court further acknowledged that public figures are better equipped to engage in such self-help than are private figures. *Id.*; *see also Wolston*, 443 U.S. at 164. The determination of whether a person is a limited purpose public figure must therefore focus on the nature and extent of that person's participation in a public controversy. *Wolston*, 443 U.S. at 167. Specifically, the defamation plaintiff must have thrust himself into that public controversy prior to the alleged defamation and must have done so with the intent to or calculated to influence the outcome of that very controversy. *Id.* at 168 (emphasis added); *see also Hutchinson*, 443 U.S. at 135.

In *Firestone*, the wife herself held press conferences during the divorce proceedings attempting to

satisfy reporters. The Court found that through those "[she] assumed no special prominence in the resolution of public questions." *Firestone*, 424 U.S. at 454-55. The Court further held that those press conferences could not turn her into a limited purpose public figure since "[s]uch interviews should have had no effect upon the merits of the legal dispute between respondent and her husband or the outcome of that trial." *Id.* at 455 n.3. The Court, in addition, found that "there is no indication that she sought to use the press conferences to thrust herself into some unrelated controversy [beside her legal dispute with her husband] in order to influence its outcome." *Id.* at 455.

In *Hutchinson*, this Court found the defamation plaintiff "at no time assumed any role of public prominence in the broad question of concern about expenditures." *Hutchinson*, 443 U.S. at 135. The Court also concluded that his access to media was limited to responding to the issue giving rise to the alleged defamation, and thus "[h]e did not have regular and continued access to the media that is one of the accouterments of having become a public figure." *Id.* at 136. He and his writings became a controversy only because of the defamatory speech by Respondents. *Id.* at 135. The Court consequently instructed that there can be no bootstrapping – "[c]learly those charged with defamation cannot by their own conduct, create their own defense by making the claimant a public figure." *Id.* (quoting *Wolston*, 443 U.S. at 167-68).

In *Wolston*, this Court disagreed with the lower court's finding that Wolston became a public figure by his own voluntary actions that invited public attention and emphasized that courts must focus on the nature and extent of an individual's participation in the particular controversy that gave rise to the defamation. *Wolston*, 443 U.S. at 165-67. The Court instead found that, since his actions giving rise to the controversy were "in no way **calculated** to draw attention to himself in order to invite public comment or influence the public with respect to any issue," and since he "never discussed the broad subject matter with the press and limited his involvement to that necessary to defend himself," he was not a limited purpose public figure. *Id.* at 168, 176 (emphasis added). To hold that private individuals can become public figures by attempting "to obtain the only redress available to them to defend themselves against actions brought . . . by others . . . would create an open season for all who sought to defame persons convicted of a crime." *Id.* at 169.

In *Foretich*, the Court of Appeals for the Fourth Circuit conducted a comprehensive examination of the nature and extent of the grandparents' participation in the Morgan-Foretich child custody dispute. After first having conducted an all-inclusive review of relevant Supreme Court precedent, the court introduced a five-part test adhering to those principles. *Foretich*, 37 F.3d at 1556. The defamation defendant argued that the grandparents "voluntarily participated in the public controversy when speaking with

news reporters, and by appearing on television, at press conferences, and at public gatherings . . . aimed at swaying public opinion in favor of their son against his former wife." *Id.* at 1557. Since Dr. Morgan had previously launched a series of public accusations against the grandparents involving sexual child abuse, plaintiffs had a right to respond without risking becoming limited purpose public figures, and they were not public figures because their public statements and actions were made predominantly in self-defense. *Id.* at 1558.

The court also clarified that plaintiffs' speech was proper since statements that simply "deny the accusations and statements that impugn the motive of the accuser are certainly responsive." *Id.* at 1560. Moreover, equally responsive are statements including "[h]onest indignation and strong words,"[8] "colorful verbiage,"[9] and even hyperbole and "exaggerated statements" of fact[10] all may be uttered in self-defense. *Id.* at 1562. To make plaintiffs public figures would create an open season for all who sought to defame them not just limited to defamation defendant. *Id.*

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[8] *Dickins v. Int'l Bd. of Teamsters*, 171 F.2d 21, 25 (D.C. Cir. 1948)

[9] *Mosrie v. Trussell*, 467 A.2d 475, 478 (D.C. 1983)

[10] *Id.* at 479.

REASONS FOR GRANTING THE PETITION

I. There Is a National Interest in Clarifying Now that the First Amendment Does Not Invest in Foreign Multinational Corporations the Same Immunities as it Guarantees a Media Defendant Against Liability in Defamation Actions

The general public, political, and economic commentators alike agree that the greatest challenge our nation has faced since the World War II is to recover from the present recession. As do the executive and legislative branches of government. Likewise, there is general agreement that the financial meltdown was propelled by a series of corporate financial scandals, which all could have been avoided. Although federal government and legislators across party lines attempt to provide increased oversight of the corporate sector, this alone is not the solution. Also needed is a higher degree of corporate transparency and self-regulation.[11] But, during the last fifteen to twenty years, corporate transparency has become increasingly absent. Corporate executives have become reluctant to speak out and the ceiling for internal criticism has become alarmingly low. The few

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[11] *See, e.g.*, Michael Herman, *Corruption helped cause financial crisis*, TIMES ONLINE, Sept. 23, 2009, http://business.timesonline.co.uk/tol/business/economics/article6846790.ece; *see generally* Posting of Richard Posner to The Becker-Posner Blog, http://www.becker-posner-blog.com/archives/2008/09/the_financial_c.html (Sept. 21, 2008, 9:15 A.M.).

that have dared to voice concern about misguided corporate strategies and risky adventures have been severely punished.

Indeed, launching smear campaigns to silence unwanted critics or potential whistle blowers has become a lucrative business. Beginning with the incidents at Brown & Williams, where upon finding itself in a legal dispute with a former top executive, it hired one of the nation's leading private investigation firms to commence a smear campaign against its former research executive, Jeffrey Wigand.[12] The result consisted of a five-hundred-page report, which was shared with the media to impeach Wigand as a witness. "This [launching a smear campaign] is increasingly becoming an important and frequent tool when designing a media strategy," according to Ben Kincannon, Senior Partner of Strategy XXI.[13] Kincannon adds that my company "has an interest in spreading disparaging information about an individual if that would favor a client of ours. It is of course beneficial to impact the public early on to reach potential jurors and judges, who will later

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[12] Rick Lyman, *A Tobacco Whistle-Blower's Life is Transformed*, N.Y. TIMES, Oct. 15, 1999, at A24.

[13] Strategy XXI and Kincannon were engaged by Respondent's parent company in January 1996 just at the onset of *Business Week*'s interest in Respondent and Petitioner. The referenced interview with Kincannon was published just as the journalist Marc Maremont sent a letter to the parent company outlining his article about Respondent and Petitioner.

handle the case at court." *Business Monthly*, March 1996.[14]

Strategy XXI and Kincannon are not alone, in the wake of this Court's silence concerning the limitations of protection extended to nonmedia defamation defendants, an entirely new consulting industry, targeting foreign nonmedia American subsidiaries, has been created and is thriving. For the last fifteen years, consulting companies have offered their services abroad to foreign companies to circumvent the American legal system. These "pre-trial impact" consultants market their professionally organized and executed media campaigns to influence the public opinion in anticipation of legal disputes just like Kincannon announced on a promotional tour in Sweden in January 1996.

The protection of and support of foreign nonmedia companies' intervention in the U.S. legal system circumventing the U.S. rule to try cases inside the courts is bound to severely damage the U.S. trial process. In a global economy, it is unwise to leave the question of silencing outspoken executives to overseas headquarters in London, Moscow, and Beijing. Such a scenario would have disastrous effects on the welfare of the U.S. economy when corporate transparency and self-regulation are needed most to bring the nation out of a serious recession created in part by an

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[14] This is from a quote in an interview by a Swedish business magazine, Lennart Pehrson, *Business Monthly*, March 1996, that has since ceased publication.

under-regulated corporate sector and silenced executives declining to speak out.

Without the protection of defamation plaintiffs' right to sue a nonmedia defendant under the negligence standard, the corporate sector can effectively silence all persons under its authority without redress. A corporation only need engage a professional "pre-trial impact" consultant team to organize a media smear campaign focusing on the stories *du jour*[15] to have the case tried under the theory of "give a dog an ill name and hang him." *Olinger v. Comm'r of Internal Revenue*, 234 F.2d 823, 824 (5th Cir. 1955).

This compelling issue is ripe for review now. In the case at hand, the lower court's vesting in a nonmedia foreign corporate defamation defendant and its foreign non-resident executives armed with professional "pre-trial impact" consultants the same constitutional protection as the First Amendment guarantees a media defendant is entirely counter-productive to important national interests. In addition, such protection and support of foreign influence cannot be read into the language of the First Amendment nor can it be suggested to have been intended by the drafters of the amendment. It is therefore compelling and urgent for this Court now to clarify that this abuse of American freedom and liberty has ended. In times

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[15] Like the widespread issues of the mid-nineties concerning sexual, race, and age harassment in the workplace or of Nazi and other politically loaded sympathies.

when resolving this issue is of extraordinary national interest, this Court alone can resolve this urgent need for constitutional clarification.

II. There Is a Compelling Need Now to Reinforce the Standards Set by This Court Defining when a Defamation Plaintiff Is a Public Figure in Response to Lower Courts' Ignorance of Supreme Court Precedent

With the Court's analysis in *Gertz* and the subsequent further clarification and particularization it seemed like this Court had succeeded in its objective to avoid "an *ad hoc* resolution of the competing interests at stake in each particular case" by "lay[ing] down broad rules of general application." *Gertz*, 418 U.S. at 343-44. Still, this Court's silence on the issue for more than a quarter century has hollowed the once consistent standard, which has "lead to unpredictable results and uncertain expectation, and . . . could render [this Court's] duty to supervise the lower courts unmanageable." *Id.* at 343.

A. There Is a Growing Split Among and Between Federal and State Courts as to what Constitutes a Public Controversy and what Degree of Public Participation in a Particular Controversy Is Necessary to Designate an Individual as a Public Figure

Most leading libel commentators today agree with the *Gertz* Court's concern and make the case

that lower courts have reached a level of unmanageable uncertainty. *See, e.g.*, Bruce W. Sanford, *Libel and Privacy* §7.3.1, 7-58 (2d ed. 1994; Supp. 2004) (labeling the *Gertz* public figure rules a "failure" and a "dismal" flop "seem[ingly] incapable of rendering consistent results in a multitude of disparate factual situations."); 1 Rodney A. Smolla, *Law of Defamation*, §2:21, 2-32 (2d ed. 2000) (distinguishing between public and private figures "is like trying to nail a jelly fish to the wall," quoting *Rosanova v. Playboy Enterprises, Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976) *aff'd*, 580 F.2d 859 (5th Cir. 1978)); 1 Robert D. Sack, *Sack on Defamation*, §5.3.6, 5-39 (3d ed. 2004) (stating that divergent case law in the state and lower federal courts makes the determination of a defamation plaintiff's status an uncertain process, differing from state to state and court to court); Laurence H. Tribe, *American Constitutional Law*, §12-12, 865 (2d ed. 1988) (commenting that, "the doctrine has become a frustrating tangle for all concerned – a mysterious labyrinth for those seeking to clear their names and a costly and unpredictable burden for the speakers the First Amendment is designed to protect.").

Although there is a widening split between federal and state courts, most have recognized the above-cited Supreme Court precedent. Many are applying the test for a limited purpose public figure first introduced by the D.C. Circuit in *Waldbaum*. 627 F.2d at 1296-98, *cert. denied*, 449 U.S. 898 (1980) (clarifying that "[r]ather a public controversy is a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants."); *see also Foretich*, 37

F.3d at 1553 (holding that when the dispute prompted Congress and the President to intervene through federal legislation, that dispute amounted to a public controversy).

An increasingly shrinking majority of federal circuit courts and state supreme courts still follow the threshold requirement of identifying an actual public controversy also suggested in *Waldbaum*. *Waldbaum*, 627 F.2d at 1296; *see, e.g.*, *Wayment v. Clear Channel Broad., Inc.*, 2005 UT 25 ¶¶ 28-33, 116 P.3d 271, 282-83 (Utah 2005); *Lundell Mfg. Co. v. Am. Broad. Cos.*, 98 F.3d 351, 363 (8th Cir. 1996); *Clyburn v. News World Commc'ns, Inc.*, 903 F.2d 29, 31 (D.C. Cir. 1990) (applying *Waldbaum* limited purpose public figure test); *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 137 (2d Cir. 1984), *cert. denied*, 47 U.S. 1054 (1985); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980) (holding that advertising and pro-business promotional efforts are not to be equated with public controversies); *Rosanova*, 580 F.2d at 860.

Yet still, other courts have failed to recognize or ignored this Court's precedent. *See, e.g.*, *Bowman*, 420 Mass. 517, 651 N.E.2d 369 (paying lip service to Supreme Court post-*Gertz* precedent and the *Waldbaum* three-step test); *Lohrenz v. Donelly*, 541 U.S. 1042 (2004) (holding that a female naval aviator became a limited purpose public figure when volunteering for a combat-ready assignment although not seeking publicity through any media activities); *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072 (3d Cir. 1985) (holding attorney was a limited purpose public figure when taking motorcycle trips with gang

members without seeking to influence the public controversy of drug trafficking); *Rosanova v. Playboy Enters.*, 580 F.2d 859, 860 (5th Cir. 1979) (voluntary acts bound to invite attention without participating to influence outcome of a public controversy made defamation a public figure); *Cottrell v. Nat'l Collegiate Athletic Ass'n*, 128 S. Ct. 1334 (2007) (mem.) (assistant football coaches became limited purpose public figures although prevented from denying and rebutting accusations through a gag order issued by the defendant); *Miles v. Sierra Club*, 546 U.S. 1091 (2005) (mem.) (holding that arguably unrelated conduct prior to the defamatory speech made a private person a limited purpose public figure); *Alaska Statebank*, 674 P.2d 288 (invoking the public figure through "bad behavior" doctrine without attempts or intent by the defamed to influence the public).

Specifically, a number of lower courts are in direct conflict with this Court's instructions that a high degree of public activity is necessary to become a limited-issue public figure as instructed by *Gertz*[16] *and Wolston*.[17] *See, e.g.*, *Miles*, 546 U.S. 1091; *Lohrenz v. Donelly*, 350 F.3d 1272, 1272-82 (D.C. Cir. 2003); *Marcone*, 754 F.2d 1072; *Clyburn*, 903 F.2d 29.

Lower courts just do not accept the standards imposed through this Court's precedent and plainly ignore the analysis conducted in these cases. Without renewed guidance from this Court, a growing number

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[16] *Gertz*, 418 U.S. at 352.

[17] *Wolston*, 443 U.S. at 167.

of lower courts will continue to require private individuals to meet the heavy burden of the *New York Times* actual malice standard even though they engage in no public conduct or make no public effort to influence the outcome of a prior controversy contrary to this Court's instructions in *Gertz*. *See also Wolston*, 443 U.S. at 166; *Firestone*, 424 U.S. at 134-35. It is therefore proper for this Court to grant this Petition to provide lower courts clarification and further guidance.

III. There Is a Compelling Need to Correct Federal Constitutional Errors Made by the Supreme Judicial Court of Massachusetts Ignoring Every Instruction from This Court

The rulings of the Massachusetts Supreme Court in public figure cases are varied, to the point of representing an absolute paradigm of inconsistent and unpredictable *ad hoc* resolutions. In a 1985 case, after first having recognized this Court's authority, the court held that "the plaintiff was a limited purpose public figure as a matter of law because he 'voluntarily thrust himself into the controversy by campaigning for [a union election].'" *Materia v. Huff*, 394 Mass. 328, 331, 475 N.E.2d 1212, 1215 (1985).

Still, ten years later, the court again faced the same issue. *Bowman*, 420 Mass. 517, 651 N.E.2d 369. As in *Materia*, the court quotes and cites relevant authority and announces its inquiry into plaintiff's

status as a *Waldbaum* test. *Id.* at 522-25, 651 N.E.2d at 373-74. Then, under the vehement protest of two dissenting Justices, the majority held that a union election is not a public controversy because others besides the participants will not feel the outcome. *Id.* at 525 (quoting *Wolston*, 443 U.S. at 167). Thus relying on the same instructions from this Court, the Massachusetts court, without attempting to distinguish the cases or indicating a setting aside of a prior opinion, delivered two irreconcilable opinions.

In the case at hand, although announcing its reasoning as a two-part *Gertz* test, the court for the first time in its opinions did not rely on Supreme Court post-*Gertz* precedents but instead on four obscure, never cited cases, one of which is a pre-*Gertz*/*Rosenbloom*-era case. (App., *infra*, 46a-49a). This indicates that this Court's supervision of lower courts has become unmanageable. Although the court cites the above *Bowman* case, it reaches a diametrically opposite conclusion when basing its finding on a misplaced general subject-matter analysis instead of adhering to the "nature and extent" inquiry as instructed by this Court. In addition to ignoring this Court's authority, the lower court's opinion is not only irreconcilable with its own precedent, but also squarely against First Circuit jurisprudence.[18]

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[18] *See Bruno & Stillman, Inc.*, 633 F.2d 583. After a comprehensive analysis of *Gertz*, and the following trilogy of seminal cases together with *Waldbaum*, the *Bruno & Stillman* court held

(Continued on following page)

A. Public Controversy

This Court has repeatedly defined how a private individual must engage the public in order to become a limited-purpose public figure. First, this Court has made it unmistakably clear that unless there is a public controversy there can be no limited purpose public figure. *Wolston*, 443 U.S. at 165-67; *Gertz*, 418 U.S. at 351-52. Second, defamation plaintiff's participation in the public controversy must have taken place **prior** to the alleged defamation. *Wolston*, 443 U.S. at 167 (emphasis added); *Hutchinson*, 443 U.S. at 135. Time after time this Court has instructed that issues of general interest and concern are not to be equated with public controversies. A public controversy must entail elements of divisiveness. *See Wolston*, 443 U.S. at 167; *Hutchinson*, 443 U.S. at 135; *Firestone*, 424 U.S. at 454; *Waldbaum*, 617 F.2d at 1297; *compare Foretich*, 37 F.3d at 1555 (holding that when public dispute prompted Congress and the President to intervene through federal legislation, then the public dispute amounted to a public controversy).

Here, Petitioner's participation was not aimed at the broad issues recognized as of general concern (App., *infra*, 47a), not public controversy, but limited to defending himself involving the narrow issue of his guilt only. (App., *infra*, 46a-49a). The lower court did

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that promotional activities promoting one's own image does not transform a company to a limited purpose public figure. *Id.*

not even attempt to equate those concerns with a public controversy just as this Court found that government spending and Soviet espionage were not. *See Wolston*, 443 U.S. at 160. The outcome of the dispute concerning Petitioner's guilt, in fact, was not felt by anyone but the parties involved. This is demonstrated by the absence of any considerable media coverage when all civil actions brought by individual former Astra USA employees after the publication of the *Business Week* article were subsequently dismissed on the merits without any finding of wrongdoing against Petitioner,[19] which likewise went unnoticed by the court below. (App., *infra*, 46a-49a). Since the truthfulness of Respondents' accusations never was a public controversy, once Petitioner had prevailed, his whereabouts were no longer newsworthy and no

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[19] In *Zortman v. Astra USA, Inc.*, No. 96-2529 (Suffolk Cty. Super. Ct.), the court struck the allegations of sexual harassment and other conduct by Petitioner, ruling that they were "scandalous" in nature and the case was resolved and dismissed. In *Dorn v. Astra USA, Inc.*, No. 96-11124-MEL (D. Mass.) all claims against Petitioner were dismissed when six former employees of Astra USA claimed that they had been the victims of a pattern of covering up sexual harassment by top ranking company officers, the court dismissed all claims against Petitioner. *See also Dorn v. Astra USA, Inc.*, 957 F. Supp. 388 (D. Mass. 1997); *Strobel v. Astra USA, Inc.*, No. 97-10171-EFH (D. Mass.) (dismissing case where plaintiff's sole claim against Petitioner was that he allegedly condoned the harassment, after filing case, was dismissed with prejudice for Petitioner); *Barouch v. Astra USA, Inc.*, No. 96-02189 (Norfolk Cty. Super. Ct.) (dismissing the entire case claiming sexual harassment by Petitioner and others as well as an environment of condoning sexual harassment and retaliation).

media outlet ever contacted him to hear his side of the story. Of interest and pointing to inefficient media access is that Petitioner prevailed in all actions where the accuser had to appear at court to be tested for veracity and truthfulness. On the contrary, in the *Astra* action, the court, against Massachusetts law, granted Astra blanket protection against *ex parte* interviews and allowed alleged victims to testify through video deposition avoiding confrontation before the jury, which also raises serious questions about Petitioner's constitutional right to due process.

The lower court embarked on a misguided and unconstitutional analysis when it shifted the focus of its inquiry from the nature and extent of Petitioner's participation in a public controversy to the public's interest in a broad issue of general concern squarely against the "nature and extent" standard established in *Gertz* and its progeny. *See Gertz*, 418 U.S. at 351; *see also Wolston*, 443 U.S. at 160; *Hutchinson*, 443 U.S. at 134-36; *Firestone*, 424 U.S. at 455.

B. Nature and Extent of Petitioner's Participation in a Particular Controversy

This Court has made it clear that defamation plaintiff's participation in a particular public controversy must have been **calculated** to draw attention to himself in order to invite public comment or influence the public with respect to the issue. *See, e.g.*, *Wolston*, 443 U.S. at 168. Specifically, the D.C. Circuit has defined that: "a person has become a

public figure for limited purpose if he is attempting to have, or realistically can be expected to have, a **major** impact on the resolution of a specific public dispute that has foreseeable and **substantial** ramifications for persons beyond its immediate participants." *Waldbaum*, 627 F.2d at 1292 (emphasis added) (cited with approval by the United States Supreme Court in a footnote to the Court's summary judgment decision in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 246 n.3 (1986)).

The court below based its findings on Petitioner's participation on two press releases issued by counsel denying and rebutting Respondents' attacks. (App., *infra*, 48a-49a). In addition, it makes a major point of the verbiage used in those denials, *id.*, and of counsel's aborted attempts to create fair media attention questioning the truthfulness of the attacks. Additionally, the lower court emphasized counsel's failed attempts to have a rebuttal broadcasted by CBS News.[20] The record is clear that Petitioner never held a press conference nor did he give any interview or appeared on television. He never discussed the broad subject matter with the press and issues the court recognized as of general concern. In fact, his participation was limited to that necessary to defend himself, and his counsel's two press releases had no

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[20] Representative of the lower court's analysis is a footnote where the court advances the misguided proposition that unsuccessful attempts to get efficient media access are characteristics of a public figure. (App., *infra*, 25a n.44).

influence whatsoever on the merits of the legal dispute between Petitioner and Respondents. *See Wolston*, 443 U.S. at 168; *Firestone*, 424 U.S. at 454-55. In fact, he never sought to thrust himself into or assumed a special prominence in the resolution of the broad issues recognized as general concerns. Furthermore, none of Petitioner's actions prior to Respondents' defamation was **calculated** to or **intended** to draw attention to himself to influence the public on any issue. On the contrary, Petitioner was overwhelmed and defenseless against Respondents' professional "pre-trial impact" consultants' media campaign and became "the dog with an ill name." *Olinger*, 234 F.2d at 824.

The lower court's reasoning is expressly at odds with this Court's opinion in all cases decided since *Gertz*. Directly against this Court's express warnings against subject-matter classifications, the linchpin of the lower court's analysis became the size and importance of the subject matter involved in Respondents' libelous speech. (App., *infra*, 46a-49a); *contrast Hutchinson*, 443 U.S. at 135. This analysis is just as unconstitutional as that applied by the plurality in *Rosenbloom*, 403 U.S. at 43-44. Unnoticed or disregarded by the lower court is that this Court rejected the *Rosenbloom* standard in *Gertz*, 418 U.S. at 343, rejected it again in *Firestone*, 424 U.S. at 456, and yet again in *Wolston*, 443 U.S. at 167-68.

The First Amendment framework that this Court has established for defamation claims required the court below to hold that Petitioner was a private

figure not subject to the *New York Times* actual malice standard. In fact, the lower court's opinion circumvents forty years of this Court's jurisprudence taking the constitutional balance of competing First Amendment interests back to the over and over again rejected *Rosenbloom* standard. In fact, the lower court's reasoning and reliance on one overruled Supreme Court case and four obscure cases, none ever cited with approval, to circumvent forty years of constitutional jurisprudence makes a nullity out of this Court's supervisory power and is so clearly erroneous that this Court's power under 28 U.S.C. §2106 might be properly invoked.

CONCLUSION

There are three reasons why the issues addressed in this Petition are appropriate for the Court's review. First, the issues are ripe for resolution, especially the application of media defendant standard to a foreign corporation and its foreign nonresident executives. Second, the opinion of the Supreme Judicial Court of Massachusetts conflicts with this Court's precedent on every aspect of the limited purpose public figure designation in defamation cases and so represents the inconsistent and unpredictable *ad hoc* resolutions that increasingly have become the norm of lower court's rulings on the issue.

A denial of certiorari in this case would be most unfortunate. Although without creating precedence and without legal meaning, a denial will undoubtedly lead people within the business community to believe that this Court is approving the balancing of constitutional rights (back to pre-*Gertz* times) upheld in the decision below. In view of the urgent national need now to clarify the unresolved issue of defining to whom the Constitution grants the status of media-defendant and of the conflict of the decision below with past decisions of this Court and the eroding recognition among lower federal and state courts of this Court's authority, the Court may wish to consider summary reversal.

Respectfully submitted,

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914 N.E.2d 36

Supreme Judicial Court of Massachusetts,
Suffolk.
ASTRA USA, INC.
v.
Lars P.E. BILDMAN;
Carl-Gustaf Johansson & others,[1]
third-party defendants (and a companion case[2]).

SJC-10361

Argued May 5, 2009.
Decided Oct. 5, 2009.

Jeffrey S. Robbins, Boston (Joseph D. Lipchitz & A.W. Phinney, III, with him) for Astra USA, Inc.

Rebecca P. McIntyre & Michael D. Weisman, Boston, for Lars P.E. Bildman.

David E. McCraw, New York, NY, & Jonathan M. Albano, Carol E. Head, & Shuan Lue, Boston, for Globe Newspaper Company, Inc., amicus curiae, submitted a brief.

Present: MARSHALL, C.J., IRELAND, SPINA, COWIN, & BOTSFORD, JJ.

MARSHALL, C.J.

A Superior Court jury found Lars P.E. Bildman liable to his former employer, Astra USA, Inc.

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[1] Astra AB and Hakan Mogren.

[2] Lars Bildman *vs.* Hakan Mogren & others.

(Astra),[3] for fraud, conversion, waste of corporate assets, breach of fiduciary duty, and sexual harassment of Astra employees, and awarded Astra damages in the aggregate amount of $1,040,812. The same jury found Astra not liable to Bildman for breach of a 1993 employment agreement between the parties (employment agreement), but awarded Bildman $203,691 in damages related to a March, 1996, supplemental stock grant. The jury returned verdicts against Bildman on his claims of intentional interference with contract against Hakan Mogren and Carl-Gustaf Johansson, two officials of Astra's Swedish parent corporation, Astra AB. Prior to trial, the judge dismissed on summary judgment Bildman's claim for attorney's fees and costs (attorney's fees) under the employment agreement and his libel action against Astra, Mogren, and Johansson; she also ruled that Astra could not rescind the employment agreement. Following a posttrial evidentiary hearing, the judge ruled that Astra could not recover by forfeiture the compensation it paid to Bildman from 1990 through his termination in June, 1996, the period in which he breached his fiduciary obligations to Astra.

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[3] At all relevant times, Astra USA, Inc. (Astra), was a wholly owned subsidiary of Astra AB, a Swedish corporation. Presently, according to Astra, Astra is "a wholly-owned subsidiary of AstraZeneca Treasury Limited, which is, in turn, owned by AstraZeneca UK Limited, a subsidiary of AstraZeneca Intermediate Holdings Limited. AstraZeneca PLC, a publicly traded company, owns AstraZeneca Intermediate Holdings Limited. . . ."

Final judgment on all claims of all parties in the consolidated actions entered on January 30, 2006. Following the denial of Bildman's motion for judgment notwithstanding the verdict or alternatively for a new trial, and his motion to alter or amend the final judgment, the parties cross-appealed. We transferred the case here on our own motion.

Five questions emerge on appeal from this lengthy and complex trial. Three are presented by Astra: (1) Did the Superior Court judge err in ruling that Astra was *not* entitled to rescind the employment agreement? (2) Did the judge err in the manner in which she applied New York law to the forfeiture issue? (3) Did the judge err in not allowing Astra to recover damages from Bildman for its costs of investigating charges of sexual harassment at Astra by Bildman and others? Bildman presses two issues on appeal: (4) Did the judge err in ruling that Astra had no obligation to pay Bildman's legal fees and costs in the consolidated actions? (5) Was summary judgment properly entered against Bildman on his libel claims?

On review of the voluminous record and the judge's orders and well-reasoned memoranda of decision, we affirm the judgments against Astra on the issues of rescission and recovery of its sexual harassment investigation costs. We also affirm the judgments against Bildman on the issues of his attorney's fees and his libel claims. We reverse the judgment denying Astra recovery of compensation it paid to Bildman during the period of his disloyalty –

$5,599,097 in salary and $1,180,000 in bonuses. We affirm the jury's verdict awarding Bildman $203,691 in damages related to the supplemental stock grant, because on appeal Astra has waived any claim of forfeiture of that award. As we explain more fully below, the judge's forfeiture rulings are incompatible with the law of New York, the State where Astra is incorporated,[4] which in the circumstances of this case requires forfeiture of the salary and bonuses Bildman earned during the period of his disloyalty. We remand the case to the Superior Court for entry of judgments consistent with this opinion.[5]

We now summarize the salient facts, necessarily in some detail because of the scope of the legal issues. Our factual summary draws on the evidence presented to the jury and the judge's findings on the remainder, which we supplement with uncontroverted material of record.

1. *Factual background.* Astra is a pharmaceutical company incorporated in New York, with its principal place of business in Westborough. During the relevant times, it was one of many worldwide subsidiaries of Astra AB, which is a Swedish pharmaceutical manufacturing corporation publicly traded on

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[4] In *Harrison v. NetCentric Corp.*, 433 Mass. 465, 471, 744 N.E.2d 622 (2001), we reaffirmed the Commonwealth's "long-standing policy of applying the law of the State of incorporation to internal corporate affairs."

[5] We acknowledge the amicus brief submitted by the Globe Newspaper Company, Inc., in support of Astra.

the New York Stock Exchange. In 1981, Bildman, a Swedish national, became president and chief executive officer of Astra (then called Astra Pharmaceuticals), and served as a member of the boards of directors of Astra and Astra Germany. In 1993, he and Astra entered into an employment agreement, which was in effect from July 1, 1993, until his employment was terminated on June 25, 1996.[6]

In 1988, Hakan Mogren became the president and chief executive officer of Astra AB. Among other things, he established a strategic goal to increase Astra's presence in the United States pharmaceutical market. Bildman successfully implemented this strategy by, among other things, effecting what the judge termed "significant management changes" and creating a new "Rx Division," which targeted the so-called "general practitioner market," the sector of the pharmaceutical industry focused on outpatients and physicians' offices.[7] By 1995, the Rx Division employed a sales force of approximately 500. Although the Rx

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[6] From 1981 to July 1, 1993, Bildman's employment at Astra was governed by the terms of an "expatriate agreement" between himself and Astra AB, which provided for the payment of enumerated expenses related to employment abroad. The terms of the expatriate agreement, including salary and benefits, varied from time to time.

[7] The judge found that "[t]he prescription drug market in the United States has two primary sectors: the hospital sector and the . . . general practitioner market ('the GP market'). At relevant times, the hospital sector represented about 10 percent of the total American prescription drug market, with the remaining 90 percent in the GP market."

Division was not profitable during Bildman's tenure, Astra and Astra AB had expected that result. From 1991 to 1996, Astra's over-all profit met or exceeded the goals established for it by the parent company, and Bildman's salary and bonuses rose steadily.[8] In 1995, Mogren promoted Carl-Gustaf Johansson to the position of Astra AB Regional Director for North America. The newly created position gave Johansson direct supervisory authority over Astra and Bildman. Johansson and Bildman soon were in dispute over the strategic direction of Astra, the details of which we need not recite.

In December, 1995, Bildman learned that Business Week was investigating allegations of sexual harassment at Astra committed by him and other members of Astra's senior management. At the time, neither Astra's nor Astra AB's board of directors was aware of sexual harassment "problems" at Astra. There was in fact a problem, and it centered on Bildman. As early as 1985, Bildman had authorized and personally signed a "consulting agreement" for

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[8] The judge found that, "[i]n 1991, Astra paid Bildman a total of $928,751.60, including a bonus of $300,000. In 1992, it paid him $893,098.18, including a bonus of $300,000. In 1993, it paid him $955,348.56, including a bonus of $200,000. In 1994, it paid him $848,824.61, including a bonus of $180,000. In 1995, it paid him $1,028,583.75, including a bonus of $200,000. In 1996, it paid him $944,490.50, and awarded him a supplemental stock grant valued at $203,691 in March of that year." Itemized by type of compensation, these numbers have a combined value of $5,599,097 in salary, $1,180,000 in bonuses, and a stock grant valued at $203,691.

his former secretary, with compensation of $3,164 per month. The former secretary testified at trial that she left the company after she had been forced to have sexual relations with Bildman. In 1993, Bildman authorized a settlement payment of approximately $25,000 to another female employee who had filed a complaint with the Massachusetts Commission Against Discrimination alleging that he had sexually harassed her. In 1994, Bildman ordered Astra's general counsel to pay $50,000 to settle a sexual harassment claim against him by another female employee, as well as a payment of $95,000 to an employee who claimed that she had been fired in retaliation for reporting a complaint of sexual assault by another member of Astra's senior management. In early 1996, Bildman authorized a payment by Astra of $100,000 to settle sexual harassment claims against him by yet another former Astra employee (also female). Each of these settlement agreements was confidential and, among other things, prohibited the complainant from cooperating with the Equal Employment Opportunity Commission (EEOC) in any investigation of sexual harassment at Astra. At all relevant times, Astra had a written sexual harassment policy that forbade the acts alleged to have been committed by Bildman and other male executives with his knowledge or condonation.[9]

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[9] The numerous sexual harassment allegations by female employees against Bildman, in addition to a claim by his former secretary of coerced sexual relations, included, among others,

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In a December 19, 1995, telephone conference, Bildman; Charles Yon, Astra's corporate counsel; and Astra's outside employment counsel informed Johansson and other Astra AB officials of the Business Week investigation of allegations of sexual harassment at Astra. Bildman then assembled a task force, comprised of Yon and outside attorneys and consultants, to monitor and investigate the Business Week probe. The task force was not set up to investigate the merits of the sexual harassment claims but rather to determine Business Week's sources of information and to control the flow of information to Business Week and Astra AB. In a January 15, 1996, letter, Bildman informed Mogren that Business Week was investigating "alleged incidents of sexual harassment at Astra," that Astra was conducting an "extensive investigation" of the development, and that Astra was "positive there is no basis for such a story and believe[s] that it is very unlikely that an article will be written." The letter did not mention that Bildman himself was a target of the Business Week inquiry, although Bildman knew this was the case. Bildman subsequently forwarded to Mogren and Johansson a task force report prepared on or about January 16, 1996, a copy of which was entered in evidence, which concluded that Astra had a good record concerning

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sexually inappropriate comments, kissing or attempts to kiss, inappropriate touching of employees' necks and buttocks, and dancing with female employees in a sexually provocative manner.

sexual harassment, and that the Business Week investigation likely was instigated by an Astra competitor, a position Bildman continued to maintain throughout the early spring to Astra AB executives and to Astra's board of directors.[10]

At a meeting of Astra's board in March, 1996, Bildman, at the suggestion of Mogren and Johansson, made a presentation about the Business Week matter. With him was Yon and another Astra employee, who assured the board that Astra had "very good records" concerning sexual harassment claims and that its statistics on sexual harassment over the previous eight to ten years compared favorably with those of comparably sized companies. At one point during the board meeting Mogren asked all three employees whether Astra had anything "to be ashamed of" in relation to sexual harassment charges. Yon answered that it did not. At a meeting in Stresa, Italy, in mid-April, Bildman again assured Astra AB

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[10] The jury heard testimony that Bildman told Johansson and other witnesses that he suspected that the competitor urging the Business Week investigation was Astra-Merck, Inc., a joint venture between Astra AB and Merck, Inc., licensed to sell Astra products in the United States. The jury also heard testimony that, as of spring, 1996, Bildman and Johansson disagreed sharply about whether certain products should be sold by Astra or Astra-Merck. In a vain attempt to support his suspicions that Mogren and Johansson were not acting in the best interests of Astra, and in response to the Business Week probe, Bildman surreptitiously tape recorded telephone conferences with Johansson and Mogren from Rhode Island, a one-party consent State.

officials of Astra's allegedly good record on sexual harassment, even though he also stated that he feared that Business Week was about to publish an article about widespread sexual harassment at Astra.[11]

From that point, events unfolded quickly. On April 16, Mark Maremont of Business Week wrote a two-page letter asking to speak with Bildman and Astra AB about "serious allegations of sexual harassment" at Astra, including allegations concerning Bildman. That same day, Maremont also sent a letter to Mogren in Sweden that enclosed his letter to Bildman and offered an opportunity for Astra AB to respond to the allegations. The next day, April 17, Yon sent a letter to Maremont denying the allegations and offering to meet with Maremont if Maremont provided more details about the charges. Maremont responded on April 18 with a seven-page letter to Yon offering additional substantiation, and on April 19 Yon forwarded a copy of the letter to Mogren, Johansson, and other Astra AB officials.[12] On receiving the letter, Johansson; Astra AB general counsel, Goran Lerenius; and Thomas Clauss, Jr., a partner in the law firm of Winthrop, Stimson, Putnam &

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[11] From December, 1995, through March, 1996, Bildman apparently also orchestrated a campaign to direct female and minority Astra employees to write letters of support for him to Astra AB.

[12] The letter, although heavily redacted, was admitted in evidence.

Roberts (Winthrop Stimson), went to Astra's headquarters in Westborough to conduct their own investigation. On April 22 and April 23, they interviewed Astra employees, including Bildman, about the Business Week allegations. As a result of its investigation, on April 28, 1996, the board of directors of Astra voted unanimously to suspend Bildman with pay, to appoint an interim president-chief executive officer of Astra, to create a special committee chaired by Johansson to investigate "allegations of sexual harassment and other improprieties or failures to abide by policies and procedures" of Astra, and to report its findings to the full board. The special committee subsequently retained Winthrop Stimson to conduct the investigation.

Johansson informed Bildman by letter of the board's decisions and asked Bildman that he both cooperate fully in the investigation and refrain from contacting any current or former Astra employees about it. Bildman did neither. He refused repeated requests from the Winthrop Stimson investigators to be interviewed. In addition, he and Lars Magnusson, a consultant at Astra whom Bildman had hired in January, 1996, contacted former and current Astra employees, asking them to deny that Bildman ever acted improperly toward female employees, and threatened others with termination or adverse publicity if they cooperated with Winthrop Stimson. The jury also heard evidence that, at Bildman's direction and without the knowledge of Astra's board, Magnusson set up a five-employee satellite office from

which he shredded corporate documents; that he and Bildman removed Astra documents, including financial documents, from Bildman's office; and that after receiving a telephone call from Bildman, Magnusson had company computers "erased."

In addition to uncovering evidence of pervasive sexual harassment of female Astra employees by Bildman and others in senior management, and evidence of the threats to employees and destruction of company documents mentioned above, the Winthrop Stimson investigation found, and the jury heard evidence of, serious financial and other improprieties.[13]

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[13] The evidence includes the following:

Bildman employed Astra vendors, including contractors, landscapers, and craftsmen, to do extensive work on the interior and exterior of his residences in Massachusetts and his vacation home in Vermont, and surreptitiously had the work billed to and paid by Astra, in an amount estimated at two million dollars for contractor services and $110,000 for landscaping and design services.

Bildman chartered yachts for two- or three-day personal sailing trips at Astra's expense without identifying the specific nature of the charges.

Bildman hired "[y]oung and attractive" female "escorts" for himself and others, and billed the expenses to Astra without identifying the specific nature of the charges.

Bildman used Astra employees to provide personal services for him on company time, including work

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In early May, 1996, Maremont's article appeared as the cover story in Business Week, under the title "Abuse of power: The astonishing tale of sexual harassment at Astra USA." Business Week reported that it had interviewed "more than 70 former and current employees" and found "a disturbing pattern of complaints during much of Bildman's 15-year tenure," including "a dozen cases of women who claimed they were either fondled or solicited for sexual favors by Bildman or other [Astra] executives." Not surprisingly, the Business Week article drew national and international attention. Reports about sexual harassment at Astra and by Bildman appeared in the Boston Globe, the Providence Journal-Bulletin, the Wall Street Journal, and in over 150 articles in various publications worldwide.

On June 25, 1996, Astra's board of directors voted to rescind the employment agreement and terminate Bildman's employment for cause,[14] and he was so

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relating to maintaining his antique automobile collection and providing private tennis lessons to his family.

Bildman directed Astra to pay $16,000 in legal costs he incurred contesting a speeding ticket fining him sixty-six dollars.

During the course of the investigation, Bildman contacted Astra vendors with requests that they alter their business records to reflect that he personally had paid for items actually paid for by Astra.

[14] At trial, Bildman testified that the employment agreement "does, of course, not permit me to engage in wrongful behavior against the company. No, it does not."

notified by letter. In February, 1998, the EEOC filed a complaint against Astra alleging a pattern and practice of sexual harassment of Astra female employees since "at least January 1, 1993 and continuing." The complaint resulted in a consent decree in which Astra, although not admitting liability, established a $9,850,000 fund to compensate victims of sexual harassment at the company.[15]

2. *Procedural background.* On February 4, 1998, Astra filed suit in the Superior Court against Bildman for fraud, breach of fiduciary duty and the duties of good faith and loyalty, waste of corporate assets, rescission of the 1993 employment agreement, and conversion. It sought a declaratory judgment that it had properly rescinded the employment agreement, and damages on the remaining counts. Bildman counterclaimed against Astra and third-party defendant Astra AB for, as amended, breach of contract, violation of G.L. c. 149, § 148 (fair wage practices act), and indemnification of attorney's costs and expenses for the civil action and for "successfully defending" the criminal action. Bildman also filed an action against Astra, Mogren, and Johansson for malicious libel, negligent libel, and libel per se. The two actions

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[15] In March, 1997, Bildman was indicted by a Federal grand jury for wire and mail fraud, filing false tax returns, and conspiracy for receiving various goods and services from Astra that he failed to report as income. In January, 1998, he pleaded guilty to three counts of wilfully filing false Federal tax returns. By plea agreement, the remaining counts were dismissed, including counts charging Bildman with defrauding Astra.

were consolidated, and were specifically assigned to one judge in the Superior Court. Of relevance to this appeal are the following proceedings in the consolidated cases.

In December, 2000, the judge granted Bildman summary judgment on Astra's claim for a judgment declaring that it properly rescinded the employment agreement. In October, 2001, the judge granted Astra's summary judgment motion on all of Bildman's libel claims on the ground that Bildman was a "limited public figure" and could not maintain a claim for negligent libel, citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). The judge also denied Bildman's motion for attorney's fees, concluding that the issue turned on whether Astra had terminated Bildman's employment for cause, a matter to be determined by a jury. The parties' remaining claims were tried before a jury.

The trial commenced in January, 2002, and took more than seven weeks. On February 21, 2002, the jury found Bildman liable to Astra for fraud, conversion, waste, and breach of fiduciary duty by, in the words of the verdict form, "making affirmative misrepresentation or failing to disclose to Astra material information which he had a duty to disclose," and for "improper use of Astra funds." As noted, the jury awarded Astra damages in the aggregate amount of $1,040,812. Further, the jury found that Bildman engaged in sexual harassment of Astra employees and that he retaliated against Astra employees who had exercised their rights to make complaints under

Astra's sexual harassment policy. (The verdict form did not provide for additional damages for these acts.)

As to Bildman's claims, the jury found that Astra did not breach the employment agreement in terminating Bildman or with regard to Astra's profit sharing plan. The jury also found against Bildman on his claims that Mogren and Johansson intentionally interfered with his employment contract with Astra. Finally, the jury found that Bildman did not fraudulently induce Astra to enter into a March, 1996, supplemental stock grant, and awarded him $203,691 under the agreement.[16]

Both parties filed postjudgment motions for relief. Astra renewed its request for rescission of the employment agreement, and requested rescission of the 1996 stock agreement, forfeiture of all of Bildman's compensation from 1991 to 1996,[17] setoff, and punitive damages. On May 5, 2005, the judge issued a memorandum of decision and order permitting setoff of Bildman's $203,691 jury award against Astra's damages, refused to revisit her pretrial rulings on rescission, held that Astra was entitled to an evidentiary hearing on the issue of forfeiture limited to the issue whether Bildman's compensation exceeded

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[16] The judge subsequently offset Bildman's damages award against Astra's. *See infra*.

[17] The issue of forfeiture did not go to the jury, the judge having determined to reserve the matter for postverdict consideration.

the value of his services for the period 1991-1996, and declined Astra's further requests for postjudgment relief. The judge held an evidentiary hearing on the forfeiture claim and ruled that Astra was not entitled to recover any amount by way of forfeiture because the value of Bildman's services was commensurate with his value to the company through 1996. Bildman renewed his motion for indemnification and for attorney's fees, which the judge denied on May 5, 2005.

We now proceed to consider the five issues on appeal.

3. *Rescission.* Astra claims that it properly rescinded the 1993 employment agreement because during contract negotiations Bildman failed to disclose material information about his own breaches of fiduciary duty, which (Astra claims) he had an affirmative duty to do as a company officer and director. The judge granted Bildman's summary judgment motion on Astra's rescission claim. The judge reasoned, in essence, that Astra had failed to establish that Bildman affirmatively misrepresented any material fact during the negotiations of the employment agreement, and that it would be inequitable to permit rescission three years after the inception of the employment agreement where Astra never inquired about the conduct in question. She declined to revisit her ruling after the verdict when Astra again sought rescission of the employment agreement and the supplemental stock grant based on the jury's findings.

On appeal Astra maintains that Bildman, as president and chief executive officer of Astra, had fiduciary obligations to Astra that required him to disclose his disloyal acts in the course of negotiating his 1993 employment agreement with Astra, and that his silence concerning them was an affirmative misrepresentation. *See, e.g., Geller v. Allied-Lyons PLC,* 42 Mass.App.Ct. 120, 125-126, 127, 674 N.E.2d 1334 (1997) (agreement void and unenforceable where corporate fiduciary gave, at best, only "sotto voce indications" of his self-interested dealings to his principal; "full and fair disclosure" of self-dealing was required). Bildman counters that, while he was negotiating the employment agreement with Astra, he was a "private individual" engaged in an arm's-length transaction, whose fiduciary obligations to the company were effectively held in abeyance.[18]

The employment agreement states that it shall be construed and enforced "in accordance with the laws of the Commonwealth of Massachusetts," and neither party contends otherwise. Under our law, rescission is an equitable remedy, within the judge's sound discretion. *See Coggins v. New England Patriots*

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[18] The jury heard conflicting evidence about whether Bildman's negotiations with Astra over the terms of the 1993 employment agreement were at arm's length. Bildman testified that Attorney Neal Tully was both Bildman's private attorney and the secretary of Astra's board of directors. Tully, according to Bildman, provided Bildman with "advice" on the employment agreement and acted as a "liaison" for the parties during contract negotiations.

Football Club, Inc., 397 Mass. 525, 536, 492 N.E.2d 1112 (1986); *Augustine v. Rogers*, 47 Mass.App.Ct. 901, 902, 710 N.E.2d 1030 (1999) ("rescission is an equitable remedy awarded at the discretion of the court"). Both because we discern no abuse of discretion in the judge's rulings on rescission and because our conclusions below on the issue of forfeiture make the remedy of rescission duplicative, at least with respect to Bildman's salary and bonuses,[19] we will not disturb the judge's grant of summary judgment to Bildman on Astra's rescission claim.

4. *Forfeiture.* (a) *Introduction.* As noted earlier, the judge reserved the issue of forfeiture for judicial determination, if necessary, following the jury's verdict. *Cf. Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 A.D.3d 1, 13, 865 N.Y.S.2d 14 (2008) (issue of forfeiture of attorney's compensation during period of alleged disloyalty is factual issue to be decided posttrial on full record, if necessary). After the jury found Bildman liable to Astra for breach of fiduciary duty, Astra moved for postjudgment equitable relief on its forfeiture claim. The judge correctly determined that New York law governed that claim. *Harrison v. NetCentric Corp.*, 433 Mass. 465, 470-471, 744 N.E.2d 622 (2001). *See* note 4, *supra*. She ordered an evidentiary hearing on forfeiture limited to the question whether Bildman's compensation during the

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[19] Astra does not specify the nature or amount of its damages under the remedy of rescission.

period of his disloyalty, 1991 through 1996, exceeded the value of his services. Based on her determination that Astra failed to prove that Bildman's compensation exceeded the value of his benefit to Astra, and that forfeiture of all of Bildman's compensation would impose a "disproportionately harsh" penalty on Bildman, the judge declined to exercise her discretion to order repayment of his salary and bonuses.

Astra continues to maintain that, under New York's strict application of the forfeiture doctrine, Bildman must forfeit all of his salary and bonuses from 1991 through 1996, an amount in excess of $5 million.[20] It argues that the judge erred as a matter of law and abused her equitable powers by limiting the remedy of forfeiture under New York law to Bildman's compensation in excess of the value of Bildman's services during the period of disloyalty, 1991 through 1996.

We review the judge's forfeiture order de novo, taking into consideration New York's forfeiture law. *See Phansalkar v. Andersen Weinroth & Co.*, 344 F.3d 184, 199 (2d Cir.2003) (reviewing de novo trial court's

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[20] Astra does not argue for forfeiture of any form of compensation other than Bildman's "salary" and "bonuses." On appeal Astra seeks forfeiture of Bildman's combined salary and bonuses from 1991 through 1996, "a total of $5,599,097 in salary and another $1,180,000 in bonuses." Astra's totals do *not* include the $203,691 value of the 1996 supplemental stock grant, an amount also listed in the judge's findings. Astra therefore has waived any claim for forfeiture of the stock grant.

application of New York forfeiture law). The judge appropriately and commendably sought to exercise her equitable powers fairly within what she perceived to be the latitude afforded her by New York law. We reverse because we conclude that, in the circumstances of this case, application of New York's "faithless servant" doctrine requires that Bildman forfeit all of his salary and bonuses from Astra for the period of disloyalty and that the judge was without authority to rule otherwise.[21]

We begin with a brief overview of New York forfeiture law.

(b) *Equitable forfeiture under New York law.* The remedy of equitable forfeiture in New York is grounded on that State's law of agency, in particular on its "faithless servant" doctrine. *See generally* R.L. Haig, Commercial Litigation in New York State Courts § 75.51 (2d ed. 2005). Under that doctrine, "[a]n agent is held to uberrima fides [utmost fidelity] in his dealings with his principal, and if he acts adversely to his employer in any part of the transaction, or omits to disclose any interest which would naturally influence his conduct in dealing with the

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[21] Although Astra's complaint alleges breaches of fiduciary duty dating back "from the 1980s," and the judge at one point in her postjudgment memorandum of decision concerning forfeiture states that Astra sought forfeiture of Bildman's compensation from 1990 to 1996, both the judge's posttrial decision on forfeiture and, apparently, Astra's appeal focus on the period 1991 through 1996, which we hold to be the forfeiture period.

subject of the employment, it amounts to such a fraud upon the principal, as to forfeit *any* right to compensation for services" (emphasis added). *Murray v. Beard,* 102 N.Y. 505, 508, 7 N.E. 553 (1886). *See Lamdin v. Broadway Surface Advertising Corp.,* 272 N.Y. 133, 138, 5 N.E.2d 66 (1936) (employee or agent "forfeits his right to compensation for services rendered by him if he proves disloyal"). *See also Royal Carbo Corp. v. Flameguard, Inc.,* 229 A.D.2d 430, 430, 645 N.Y.S.2d 18 (N.Y.1996) ("well settled that one who owes a duty of fidelity to a principal and who is faithless in the performance of his or her services is generally not entitled to recover compensation, whether commissions or salary"); *Soam Corp. v. Trane Co.,* 202 A.D.2d 162, 163, 608 N.Y.S.2d 177 (1994) ("agent is held to the utmost good faith in his dealings with his principal, and forfeits any right to compensation for his services if he acts adversely to his employer"); *Bon Temps Agency Ltd. v. Greenfield,* 184 A.D.2d 280, 281, 584 N.Y.S.2d 824 (1992) ("disloyal employee is not entitled to receive compensation, whether commissions or salary").

The law of New York requires the disloyal employee to forfeit his compensation even if he otherwise performed valuable services for the principal. As the Court of Appeals of New York stated in its oftencited modern case on forfeiture: "One who owes a duty of fidelity to a principal and who is faithless in the performance of his services is generally disentitled to recover his compensation, whether commissions or salary. . . . Nor does it make any

difference that the services were beneficial to the principal, or that the principal suffered no provable damage as a result of the breach of fidelity by the agent." *Feiger v. Iral Jewelry, Ltd.*, 41 N.Y.2d 928, 928-929, 394 N.Y.S.2d 626, 363 N.E.2d 350 (1977). This principle was recently reaffirmed in *William Floyd Union Free Sch. Dist. v. Wright*, 61 A.D.3d 856, 877 N.Y.S.2d 395 (2009), in which the Appellate Division of the New York Supreme Court reversed a trial court decision limiting forfeiture of retired disloyal employees' retirement insurance benefits to ten years. The court held that where "defendants engaged in repeated acts of disloyalty, complete and permanent forfeiture of compensation, deferred or otherwise, is warranted under the faithless servant doctrine." *Id.* at 859, 877 N.Y.S.2d 395.[22]

The rule enunciated in *Murray v. Beard, supra; Feiger v. Iral Jewelry, Ltd., supra;* and the other cases cited above might seem to imply that disloyal employees and agents must forfeit all compensation ever received from the employer. *See Phansalkar v. Andersen Weinroth & Co., supra* at 204 (noting traditional rule). New York's intermediate courts, however, have, although not always uniformly or

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[22] For equitable forfeiture to apply under New York law, the disloyal employee's breach of fiduciary duty need not rise to the level of fraud. *See Phansalkar v. Andersen Weinroth & Co.*, 344 F.3d 184, 204 (2d Cir.2003) (finding "nothing in New York law to suggest that a specific intent to defraud is necessary to render misconduct sufficient to warrant forfeiture").

consistently, carved out limitations to absolute forfeiture. For example, Appellate Division decisions generally have limited the period of forfeiture to the period of the employee's disloyalty. *See, e.g., Soam Corp. v. Trane Co., supra* at 163, 608 N.Y.S.2d 177 (defrauded principal not liable to disloyal agent for commission fees earned during period of disloyalty); *Maritime Fish Prods., Inc. v. World-Wide Fish Prods., Inc.,* 100 A.D.2d 81, 91, 474 N.Y.S.2d 281 (1984) (employee who worked for company for approximately seven years must forfeit compensation received during fourteen-month period of disloyalty). Others have required the disloyalty to be substantial and pervasive for forfeiture to apply. *See, e.g., Matter of Blumenthal,* 32 A.D.3d 767, 768, 822 N.Y.S.2d 27 (2006) ("In light of respondent's repeated disloyalty throughout his tenure, there is no merit to his assertion that there should have been an apportionment of his salary or . . . commissions as to which disloyalty was not found"). *See also Phansalkar v. Andersen, Weinroth & Co., supra* at 202 n. 13. These limitations are narrow, however, and do not destroy the vitality of the faithless servant doctrine under New York law.[23] *See, e.g., William Floyd Union Free Sch. Dist. v. Wright,* 61 A.D.3d 856, 859, 877 N.Y.S.2d 395 (2009) (where "defendants engaged in

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[23] *See, e.g., Schwartz v. Leonard,* 138 A.D.2d 692, 694, 526 N.Y.S.2d 506 (1988) (single act of disloyalty-a lawyer removing files that he had been working on from defendant's office and then starting a law practice of his own – not "persistent pattern of disloyalty" and thus did not warrant any forfeiture).

repeated acts of disloyalty, complete and permanent forfeiture of compensation, deferred or otherwise, is warranted under the faithless servant doctrine").[24]

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[24] As the parties and the judge acknowledged, Federal courts purporting to apply New York's strict law on forfeiture have expressed some unease about the doctrine's sometimes harsh consequences, and in general have engaged in a more contextual approach to the agent's disloyalty. *See, e.g., Design Strategy, Inc. v. Davis,* 469 F.3d 284 (2d Cir.2006) (disloyal employee who earned both base salary and sales commissions forfeits all salary paid during period of disloyalty but not his commissions earned, because employee's disloyalty did not arise in connection with any commissions to which he was entitled under terms of his employment agreement); *Phansalkar v. Andersen, Weinroth & Co.,* 344 F.3d 184, 205 (2d Cir.2003) (expressing concern that earlier Federal forfeiture holdings were in "tenuous posture" in relation to New York law). *See also G.K. Alan Assoc., Inc. v. Lazzari,* 44 A.D.3d 95, 103, 840 N.Y.S.2d 378 (2007), aff'd, 10 N.Y.3d 941, 862 N.Y.S.2d 855, 893 N.E.2d 133 (2008) (noting that Federal courts attempting to predict how Court of Appeals of New York would apply forfeiture have held that faithless servants forfeit only compensation related to transaction in which disloyalty occurs, provided, inter alia, that parties agreed to task-by-task compensation regime), quoting *Phansalkar v. Andersen, Weinroth & Co., supra.* Nonetheless, the rulings of the United States Court of Appeals for the Second Circuit on New York forfeiture law adhere to the principle of strict forfeiture of all compensation for the period of disloyalty or the task disloyally performed. Thus, for example, in the *Phansalkar* case, *supra* at 187, the disloyal employee was required to forfeit all compensation earned after the first act of disloyalty, including $4.4 million in stock awarded for services faithfully rendered. In *Sequa Corp. v. GBJ Corp.,* 156 F.3d 136, 146-147 (2d Cir.1998), the disloyal employee was ordered to forfeit $900,000 in compensation for disloyal acts that cost the company approximately $26,000.

(c) *Application of equitable forfeiture.* While acknowledging in her posttrial memorandum that New York law governed forfeiture, and that a faithless servant is "generally disentitled to recover his compensation" under New York law, the judge offered three reasons why she was "not persuaded" that Astra was entitled to the "extreme" remedy of forfeiture of all compensation from the commencement of the period of disloyalty. We conclude that the rationales are not supported in New York forfeiture law.

First, the judge stated that New York forfeiture law requires only that compensation allegedly *due* to the disloyal employee must be forfeited, and not that compensation already paid must be disgorged. We conclude that applicable New York precedent is to the contrary. *See, e.g., Luskin v. Seoane,* 226 A.D.2d 1144, 1145, 641 N.Y.S.2d 478 (1996) (disgorgement of "all compensation and expenses that plaintiff paid" to disloyal employee during period of disloyalty); *Maritime Fish Prods., Inc. v. World-Wide Fish Prods., Inc.,* 100 A.D.2d 81, 91, 474 N.Y.S.2d 281 (1984) (company "entitled to the *return* of any compensation paid [its employee] during the period of disloyalty"). *See also Aramony v. United Way Replacement Benefit Plan,* 191 F.3d 140, 153-154 & n. 6 (2d Cir.1999) (affirming judge's order for disgorgement of all salary during period of disloyalty, limited to seven-year statute of

limitations period).[25] In a more recent definitive statement, the Appellate Division found "no merit to [the disloyal employee's] argument that disgorgement of compensation received by a faithless employee should be disallowed as tantamount to the imposition of punitive damages." *Matter of Blumenthal,* 32 A.D.3d 767, 768, 822 N.Y.S.2d 27 (2006). In sum, New York law entitles Astra to sums already paid in compensation to Bildman during the period of his disloyalty.

Second, the judge sought to distinguish Astra's claim for forfeiture on the ground that New York "generally" applies forfeiture only to what she termed "low-level" employees who had diverted corporate opportunities. Again, this is a distinction not supported by New York law. The defendant in *Aramony v. United Way Replacement Benefit Plan, supra* at 143, 145, was the former president and chief executive officer of a major national charitable corporation who, among other things, improperly used the charity's funds and filed false expense accounts in order to sustain his extravagant lifestyle. The employee in *Matter of Blumenthal, supra,* was a former executor who diverted monies from the estate to "himself and his wife and entities with which his wife was affiliated," falsely claiming that they were incentive payments. *See also Maritime Fish Prods., Inc. v.*

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[25] To the extent that the statute of limitations may be implicated in a claim of forfeiture, the judge held, and we agree, that Bildman failed to assert this defense and it is waived.

World-Wide Fish Prods., Inc., supra (company vice-president diverted corporate opportunities and set up rival business while in company's employ); *Harry R. Defler Corp. v. Kleeman,* 19 A.D.2d 396, 399-401, 243 N.Y.S.2d 930 (1963), aff'd, 19 N.Y.2d 694, 278 N.Y.S.2d 883, 225 N.E.2d 569 (1967) (general manager vice-president misused company's confidential information to set up competing company). Like Bildman, *see* note 13, *supra,* these defendants were senior executives who used their position for substantial improper personal gain; they were required to forfeit their compensation as a consequence.

Third, and perhaps most significantly, the judge opined that "[r]ules of reason and fairness and the lack of New York Court of Appeals decisions mandating forfeiture in all cases of breach of fiduciary duty suggest that this Court should follow a less strict approach in determining how to impose forfeiture." In other words, the judge reasoned that forfeiture of the entirety of Bildman's compensation for the period of disloyalty was unfair in light of Bildman's substantial services to Astra.[26] Accordingly, the judge looked to Massachusetts equitable principles to fashion the requirement that Astra was entitled to forfeiture of only the amount of compensation determined after an evidentiary hearing to be

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[26] Astra does not challenge the judge's posttrial findings on Bildman's substantial contributions to Astra.

in excess of the value of Bildman's services to the company.

Reliance on Massachusetts equity law was misplaced.[27] Massachusetts permits a task-by-task apportionment of forfeiture; New York, the State whose law controls here, does not. Compare *Chelsea Indus., Inc. v. Gaffney,* 389 Mass. 1, 14, 449 N.E.2d 320 (1983), with *Maritime Fish Prods., Inc. v. World-Wide Fish Prods., Inc.,* 100 A.D.2d 81, 91, 474 N.Y.S.2d 281 (1984) (company "entitled to the return of *any* compensation paid [its employee] during the period of disloyalty" [emphasis added]). Under Massachusetts law, the value of the disloyal employee's faithful services is determinative; under New York law, it is irrelevant. Compare *Meehan v.*

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[27] Astra makes no claim of breach of fiduciary duty under the employment agreement, which is governed by Massachusetts law. Its claim for forfeiture is explicitly (and exclusively) based on loyalty principles. In its complaint, Astra requested that the Superior Court, "[p]ursuant to Count II (Breach of Fiduciary Duty), enter judgment for the plaintiff in the full amount determined through the accounting, as well as such other amounts attributable to [Bildman's] breaches of his obligations to the plaintiff." The jury, moreover, found that Bildman had violated his fiduciary duty, not his fiduciary duty under the employment agreement. Finally, it is established that the specific remedy of forfeiture of compensation is a consequence of application of the "faithless servant" doctrine, which is rooted in fiduciary principles. *See* Annot., Application of "Faithless Servant Doctrine," 24 A.L.R.6th 399, 399 (2007) ("The faithless servant doctrine provides that an employee who violates his or her duty or loyalty of fidelity in the performance of his or her employment duties forfeits the right to compensation therefor").

Shaughnessy, 404 Mass. 419, 440, 535 N.E.2d 1255 (1989), with *Feiger v. Iral Jewelry, Ltd.,* 41 N.Y.2d 928, 928-929, 394 N.Y.S.2d 626, 363 N.E.2d 350 (1977) (makes no difference "that the services were beneficial to the principal, or that the principal suffered no provable damage as a result of the breach of fidelity by the agent").[28]

In short, invocation of Massachusetts doctrines of equitable forfeiture to remediate what the judge considered a result contrary to "reason and fairness" was not appropriate where settled precedent of New York law requires forfeiture in the circumstances of this case. Bildman argues that the judge's actions were permissible because, although New York law

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[28] The judge's rationale for refashioning the forfeiture requirements of New York law relied on *Meehan v. Shaughnessy,* 404 Mass. 419, 440, 535 N.E.2d 1255 (1989); *Chelsea Indus., Inc. v. Gaffney,* 389 Mass. 1, 14, 449 N.E.2d 320 (1983), and similar decisions applying Massachusetts law. *See In re Tri-Star Techs. Co.,* 257 B.R. 629, 637 (Bankr.D.Mass.2001) (applying Massachusetts law because "the forfeiture remedy is not a penalty but really reimbursement of payment for services not properly performed . . . compensation is often apportioned in relation to services indeed properly performed"); *Anderson Corp. v. Blanch,* 340 Mass. 43, 51, 162 N.E.2d 825 (1959); *Production Mach. Co. v. Howe,* 327 Mass. 372, 378-379, 99 N.E.2d 32 (1951); and *Lydia E. Pinkham Med. Co. v. Gove,* 303 Mass. 1, 6, 20 N.E.2d 482 (1939). It is evident, however, that Massachusetts forfeiture law is more lenient on the issue of retainable compensation than New York law. *See* generally Sheridan, Second Circuit Draws Bright Line on Forfeiture of Pay for Disloyalty, N.Y.L.J. Feb. 23, 2004, at 9, col. 1 (contrasting New York's "bright line" rule of forfeiture with more relaxed Massachusetts forfeiture standards).

governs the issue whether an employee breached his fiduciary duties, Massachusetts remedies may apply if the case is heard in the Commonwealth. To the contrary, to separate the breach and the remedy in this fashion would interfere with New York State's legitimate interest in regulating the affairs of its corporations. *See Harrison v. NetCentric Corp.*, 433 Mass. 465, 470-471, 744 N.E.2d 622 (2001), quoting *Atherton v. Federal Deposit Ins. Corp.*, 519 U.S. 213, 224, 117 S.Ct. 666, 136 L.Ed.2d 656 (1997) ("To avoid the imposition of 'conflicting demands,' 'only one State should have the authority to regulate a corporation's internal affairs – matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders'"). Such regulation extends to imposing the specific penalties the State deems most likely to deter the corporate misconduct it seeks to discourage. The rule urged by Bildman would permit identical employee breaches of disloyalty to New York corporations to be treated differently based on accidents of geography, an unacceptable result.[29] *See Harrison v. NetCentric Corp., supra.*

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[29] Bildman also asserts on appeal that the judge had authority under New York principles of equity to reshape the remedy of forfeiture as she did. *See* N.Y. Civ. Prac. L. & R. §§ 3017, 3215 (McKinney Supp.2009) ("the court may grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded, imposing such terms as may be just"). However, Bildman has cited no decision in which a New York appellate court has invoked this equitable authority to relax the

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Once it was determined that from 1991 to his termination on June 25, 1996, Bildman, a senior employee, officer, and director, had committed numerous and substantial breaches of his fiduciary duties to Astra, forfeiture is warranted of all of Bildman's compensation for the period of disloyalty, to the extent sought by Astra. *See* note 20, *supra*; *William Floyd Union Free Sch. Dist. v. Wright,* 61 A.D.3d 856, 859, 877 N.Y.S.2d 395 (2009).[30]

New York forfeiture standard that has developed well over one century. *Design Strategy, Inc. v. Davis,* 469 F.3d 284, 300 (2d Cir.2006). Cf. *Shomron v. Fuks,* 286 A.D.2d 587, 730 N.Y.S.2d 90 (2001) (petition to disqualify opposing party's law firm and to order American Arbitration Association to reinstate original arbitrator); *Ungewitter v. Toch,* 31 A.D.2d 583, 294 N.Y.S.2d 1013 (1968), aff'd, 26 N.Y.2d 687, 308 N.Y.S.2d 858, 257 N.E.2d 40 (1970) (damage award in lieu of rescission for fraudulent purchase of farm).

[30] Our conclusions on the issue of forfeiture make it unnecessary to consider at length the judge's findings, after the evidentiary hearing on forfeiture, that Bildman's breaches of duty, although serious, were ancillary to the significant contributions he made to Astra's business. The evidence heard by the jury was overwhelming that from 1991 through 1996, Bildman used Astra as his personal checkbook and his sexual fiefdom, in the process driving away employees, creating a corrosive corporate atmosphere, causing Astra actual loss, and leading to months of bad publicity about the company. We agree with Astra that, as a matter of law, even under the more lenient substantial and pervasive standards of forfeiture, *see* text accompanying note 23, *supra*, Bildman's breaches of fiduciary duty mandate equitable forfeiture of his compensation during the period of his disloyalty.

New York's forfeiture law has been described as harsh, as the judge determined it to be. Cf. *Soam Corp. v. Trane Co.*, 202 A.D.2d 162, 163, 608 N.Y.S.2d 177 (1994) (plaintiff argued that forfeiture is "unconscionable penalty," but court concluded that this contention was negated by "New York's strict application of the forfeiture doctrine"). For New York, however, the harshness of the remedy is precisely the point. *See, e.g., Matter of Blumenthal,* 32 A.D.3d 767, 768, 822 N.Y.S.2d 27 (2006) ("no merit" to respondent's argument that "disgorgement of compensation received by a faithless employee should be disallowed as tantamount to the imposition of punitive damages," and declining invitation to abolish faithless servant doctrine, "which has long been the law of this State").

5. *Costs of investigation.* The judge refused to permit Astra to argue to the jury that Bildman was liable to the company for the entire $905,080 cost of Winthrop Stimson's investigation of the sexual harassment claims. She then denied Astra's motion for postverdict damages for investigative costs in the same amount. She declined to make the award because, among other things, she viewed it as "excessive" in the circumstances. Astra maintains on appeal that it is entitled to the full $905,080 as the compensatory damage it suffered as a result of Bildman's

misconduct, an issue, it argues, that should have gone to the jury.[31]

The judge did not abuse her discretion in keeping this issue from the jury. The judge noted that the matter of damages for investigative costs "has never squarely been an issue in this case." She reasoned that, given the number of witnesses that would be required to explore the propriety of each item of services rendered by Winthrop Stimson in its sixty-nine page bill, and its costs, the issue would be too confusing and time-consuming for the jury, which had already been sitting for seven weeks.[32] *See Commonwealth v. Durning*, 406 Mass. 485, 497, 548 N.E.2d 1242 (1990) (within judge's discretion to exclude evidence that, while relevant, presents danger of "confusion, unfair prejudice, or undue consumption of time" that outweighs probative worth of evidence offered).

We are also unpersuaded that Astra has met its burden of proving to the judge its entitlement to

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[31] On appeal, Bildman counters that the investigative costs are "expressly barred" by the employment agreement, which provides in relevant part: "In no event shall the Employee be required to reimburse the Company for any legal fees or expenses incurred by it in connection with this Agreement." We agree with Astra that this theory was not presented before the trial court and is waived. *See, e.g., Matter of Balliro*, 453 Mass. 75, 85 n. 9, 899 N.E.2d 794 (2009) (waiver).

[32] On appeal, Astra does not argue before us that it properly framed this issue for the jury.

$905,080 in investigation costs.[33] *See Hawthorne's, Inc. v. Warrenton Realty, Inc.*, 414 Mass. 200, 210 n. 7, 606 N.E.2d 908 (1993). Astra correctly asserts that an employer may be entitled to recover for compensatory costs incurred as a result of a breach of fiduciary duty, including the costs of investigation. *See Aramony v. United Way Replacement Benefit Plan*, 191 F.3d 140, 154 (2d Cir.1999). But the award of damages for investigative costs itself is not an entitlement; the employer must still meet its settled burden of proving that the damages sought were caused by the employee.[34] *See Chelsea Indus., Inc. v. Gaffney*, 389 Mass. 1, 18, 449 N.E.2d 320 (1983) (affirming damage award of specific costs where master found such costs to be "direct consequence of the breaches of fiduciary duty by the defendants"). Here the jury found that Bildman's affirmative and material misrepresentations and improper use of Astra funds was "a substantial factor in causing harm

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[33] The parties do not argue whether this issue is decided under Massachusetts or New York law. The case law of both jurisdictions demands the same result. *See Chelsea Indus., Inc. v. Gaffney*, 389 Mass. 1, 18, 449 N.E.2d 320 (1983) (defendants' arguments failed because they ignored causation found by master); *Aramony v. United Way Replacement Benefit Plan*, 191 F.3d 140, 154 (2d Cir.1999) (failure to prove causation is fatal to claim for costs of investigation).

[34] To the extent that Astra argues that it was entitled to recoup the investigative costs merely because it was "legally *required* to conduct a prompt and thorough investigation," this assertion again is no substitute for the requirement of proving causation.

to Astra." However, merely pointing to these findings, as Astra does, does not satisfy the causation requirement for damages related to investigative costs.

Nor does the record permit a finding of the necessary causation. At trial, Bildman established decisively, as the judge subsequently noted, that many of the investigative costs that Astra alleged resulted from Bildman's acts had no direct relationship to Bildman, other than the fact that his own wrongdoing spurred revelations of the wrongdoings of others.[35] Even accepting Astra's argument that Bildman's conduct was a "substantial factor" in its choice to conduct a detailed investigation of circumstances at the company, it is established that the "substantial factor" standard is insufficient to satisfy

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[35] The record establishes, for example, that some of the items enumerated in Winthrop Stimson's bill of its investigation related to sexual harassment of female employees by senior Astra executives other than Bildman, and even by Astra customers. The pervasive sexual harassment resulted in a settlement with the Equal Employment Opportunity Commission (EEOC). Another substantial portion of Winthrop Stimson's bill centered on the EEOC action noted above, which resulted in the entry of a consent decree against Astra. The judge properly characterized the consent decree as focusing on Astra's "own sexual harassment policies and practices, and the underlying case related to the hostile work environment created by several individuals connected with Astra, not Bildman alone." Another portion of the Winthrop Stimson bill was for the settlement of individual actions brought by current or former Astra employees. After the jury's verdict, a Winthrop Stimson attorney testified, the law firm did not allocate its time for different services billed on the same date.

causation. *See, e.g., L.N.C. Invs., Inc. v. First Fid. Bank,* 173 F.3d 454, 465 (2d Cir.1999), *S.C.,* 308 F.3d 169 (2d Cir.2002), cert. denied, 538 U.S. 1033, 123 S.Ct. 2080, 155 L.Ed.2d 1063 (2003) (rejecting further use of "substantial factor" analysis, in favor of causation analysis, where "damages are sought for breach of fiduciary duty under New York law"). Indeed, the authority cited by Astra to establish in effect its automatic entitlement to the totality of the investigation costs demonstrates the opposite.[36] In the absence of sufficient evidence on causation regarding the full cost of the investigation, we discern no error

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[36] *See Aramony v. United Way Replacement Benefit Plan, supra* (rejecting argument for recovery of "one hundred percent" of investigation costs because employee's "misconduct was a substantial factor as to some portion of them" and affirming proportionate damage award of costs of investigating defendant's misconduct to extent United Way had "establish [ed] separately the requisite causation as to these distinct services and costs"); *Rubin Quinn Moss Heaney & Patterson, P.C. v. Kennel,* 832 F.Supp. 922, 936 (E.D.Pa.1993) (employer entitled to damages award of costs of investigation where court specifically found that employer's costs were incurred "[a]s a result of" defendant's breach of fiduciary duty, which "caused" investigatory costs); *Enstar Group, Inc. v. Grassgreen,* 812 F.Supp. 1562, 1564, 1568 (M.D.Ala.1993) (trial evidence "established" that employer incurred investigatory costs because employee "conceal[ed]" facts pertaining to "specific subjects" of investigation and "misrepresent[ed]" his activities). *See also American Fed. Group, Ltd. v. Rothenberg,* 136 F.3d 897, 907-908 n. 7 (2d Cir.1998) (less stringent "substantial factor" standard inappropriate where "the remedy sought is damages to compensate for a claimant's loss" because in that context "the usual damages-causation rule for tort and contract breach cases is appropriate").

in the judge's characterization of the request as "excessive." Even if Bildman's misconduct was a substantial factor in causing Astra to pay for a wide variety of services, that does not entitle it to recover for services that the judge found to be unrelated to Bildman's misconduct, simply because the same providers rendered the services and they bore some tangential relationship to Bildman's behavior. We affirm the denial of Astra's claim for the totality of its sexual harassment investigative costs.

6. *Bildman's legal fees.* The judge denied Bildman's motion for judgment on his counterclaim for legal fees and costs under the employment agreement, and entered judgment for Astra on the counterclaim. Bildman argues, in essence, that the employment agreement, read as a whole, compels a different result and obligates Astra to pay the legal fees and costs of his defense and counterclaims. Alternatively, he claims that, at a minimum, the employment agreement requires Astra to pay the legal fees and costs he incurred in successfully pressing his claim for compensation under the 1996 supplemental stock grant. The Superior Court judge's ruling on the issue of legal fees and costs is sound, and we will not disturb it.

As noted earlier, the employment agreement is expressly governed by Massachusetts law, and our review is plenary. *See Bank v. Thermo Elemental Inc.*, 451 Mass. 638, 648, 888 N.E.2d 897 (2008). We construe the employment agreement, whenever possible, as a workable and harmonious whole, in which

each provision has meaning and furthers the parties' intent. *See J.A. Sullivan Corp. v. Commonwealth,* 397 Mass. 789, 795, 494 N.E.2d 374 (1986), quoting *Charles I. Hosmer, Inc. v. Commonwealth,* 302 Mass. 495, 501, 19 N.E.2d 800 (1939) (contract must be construed so as to yield "a workable and harmonious means for carrying out and effectuating the intent of the parties"). Our starting point is the language of the employment agreement itself. Here, we are particularly concerned with par. 9 and par. 4(f), both individually and in concert.

Paragraph 9 of the employment agreement provides, in relevant part, that Astra shall pay to Bildman "all reasonable legal fees and expenses incurred by him in contesting or disputing *any* termination of this Agreement or in seeking to obtain or enforce any right or benefit provided by this Agreement" (emphasis added). Termination is defined by par. 4(f) to encompass termination by Astra for cause.[37] "Cause" is therein defined as (i) "the willful commission . . . of theft, embezzlement, fraud or other serious and substantial crimes" against Astra; (ii) "other acts or omissions materially evidencing bad

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[37] The other circumstances of termination under par. 4 of the employment agreement are death, disability, termination by Bildman without cause, termination by Astra without cause, termination by Bildman for cause, and termination on change of control of Astra. Paragraph 1 of the employment agreement declares that it shall "remain in full force and effect until terminated in accordance with and subject to the provisions of Paragraph 4."

faith toward" Astra; (iii) "conviction of . . . any criminal offense involving dishonesty or breach of trust or any felony"; or (iv) "the willful and egregious refusal or failure of [Bildman] to perform his duties at a level of performance reasonably satisfactory to the Board of Directors" continuing for more than sixty days after written notice by the board of such failure. Paragraph 4(f) further provides that if Bildman's employment is terminated for cause, so defined, Astra "shall have *no further obligation* to [Bildman] hereunder, except any obligation under any compensation or benefit plan in which [Bildman] is then a participant" (emphasis added).

Bildman's interpretation of the employment agreement places foremost emphasis on the word "any" in par. 9. He argues that the parties must have intended to include payment of his legal fees and costs for "any" termination action, including termination for cause, because the only scenario under which Bildman and Astra would likely litigate against each other would be his termination for cause. Fairly read, he argues, the limiting language of par. 4(f) applies only to Astra's obligations to pay termination benefits to Bildman beyond those he had earned. We are unpersuaded.

Paragraph 4 (f), which limits Astra's "obligation[s]" to Bildman where he has been discharged for cause, is unambiguous, as Bildman concedes. The payment of Bildman's legal fees and costs is a contractual obligation, and the employment agreement does not specify otherwise. The language of par. 4(f),

limiting Astra's obligation to Bildman where he has defrauded or otherwise wronged the company, is conspicuously absent from the other provisions addressing termination of Bildman's employment with Astra. We may reasonably assume, as did the judge, that the parties did not intend to establish as a benefit of Bildman's employment his entitlement to defraud Astra at its own expense. Moreover, in construing the employment agreement to deny Bildman his legal fees and costs, the judge relied on a cardinal principle of contract interpretation under which a more specific contract provision controls a more general provision on the same issue. *See Lembo v. Waters,* 1 Mass.App.Ct. 227, 233, 294 N.E.2d 566 (1973), quoting A. Corbin, Contracts § 547, at 176 ("If the apparent inconsistency is between a clause that is general and broadly inclusive in character and one that is more limited and specific in its coverage, the latter should generally be held to operate as a modification and pro tanto nullification of the former").

We are also unmoved by Bildman's argument that the judge destroyed the benefit of his bargain by erroneously reading a good faith requirement into par. 9, thus making it duplicative of the indemnification provisions of par. 8, which are predicated on good-faith actions.[38] We agree that par. 9, read in

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[38] Paragraph 8 provides: Astra "agrees to indemnify [Bildman] in his capacity as an officer and member of the Board of Directors of the Company, all to the maximum extent permitted under the laws of the Commonwealth of Massachusetts, from

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conjunction with the termination provisions of par. 4, gives Bildman a broader entitlement to payment of his legal fees and costs than does par. 8, but there is no evidence to suggest that that greater coverage extends to acts undertaken in bad faith against Astra itself. Rather, the wording of the employment agreement makes clear that, in certain adversary actions between Bildman and Astra that are not covered by the indemnification provisions of par. 8, Astra would be required to pay Bildman's costs of litigation. These adversary actions would include, for example, an action under par. 4(g) disputing whether a change of corporate control triggering Bildman's termination had occurred, or a dispute arising under par. 4(a) concerning a continuation of benefits to Bildman's spouse and children on his death. There is no merit to Bildman's claim that the judge's construction of par. 9 renders it hollow.[39]

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and against any and all claims, damages, suits, costs, or liabilities, arising out of or relating to the performance of his duties and responsibilities as President and Chief Executive officer. The provisions of this Paragraph 8 shall survive expiration or termination of the Agreement for any reason."

[39] The judge held that, even if the award of litigation costs under par. 9 could be construed as unaffected by the limiting provision of par. 4(f), Bildman's adjudicated acts of bad faith against Astra operated as a material breach of the employment agreement that as a matter of law excused any further obligation of performance by Astra. *See Quintin Vespa Co. v. Construction Serv. Co.*, 343 Mass. 547, 554, 179 N.E.2d 895 (1962) (material breach of contract by one party excuses other party from further performance as matter of law). In light of our

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The judge held that the indemnification provision of par. 8 was unavailable to Bildman because the jury found that he acted in bad faith, a point that Bildman does not, nor could, contest. *See* G.L. c. 156B, § 67 (providing, in part, that corporate officers and directors may not be indemnified with respect to any matter in which they have been adjudicated not to have acted in good faith toward corporation).

Nor do we find merit in Bildman's secondary argument that he is entitled to reimbursement from Astra for legal fees and costs related to his "successful" action on the 1996 stock options.[40] *See* note 20, *supra*. As we have seen, par. 4(f) of the employment agreement provides that the company shall have "no further obligation" to Bildman if he is terminated for cause except "any obligation under a compensation or benefit plan" in which Bildman participated. Astra issued a "long term management stock plan letter agreement" (letter agreement) in March, 1996, granting Bildman certain shares of stock pursuant to the company's 1993 long-term

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holding above, we need not address this rationale, other than to note that we find nothing in the language of the employment agreement to support Bildman's claim that it operated to limit Astra's common-law rights under the laws of the Commonwealth. Cf. *Sahli v. Bull HN Info. Sys., Inc.*, 437 Mass. 696, 697 n. 3, 774 N.E.2d 1085 (2002) (release of common-law claims).

[40] The judge's ruling denying Bildman's contractual claim for legal costs and fees does not separately address the stock option controversy, although Bildman did press that separate argument below.

management stock plan (stock plan). Bildman acknowledged in writing receiving both documents. Neither the letter agreement nor the stock plan provides for the payment of Bildman's legal fees and costs in a contested action with the company. Thus, neither the employment agreement nor the stock option agreements entitle Bildman to attorney's fees for his dispute with Astra concerning the 1996 supplemental stock grant.

7. *Negligent libel.* Before trial, the judge allowed Astra's motion for summary judgment on Bildman's claims for negligent libel, malicious libel, and libel per se based on various statements published by Astra, Johansson, and Mogren from April 29, 1996, through June 26, 1996.[41] Bildman ascribes error only to the judge's ruling that he was a "limited purpose public figure" and thus unable to sustain a libel claim absent clear and convincing proof of "actual malice," that is, that the statement was made with knowledge of its falsehood or with reckless disregard for whether it was false.[42] *See New York*

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[41] We reject Astra's claim that Bildman waived the argument that he was a private person and not a limited purpose public figure because Bildman never asserted on summary judgment that he was a private individual. We agree with Bildman that his argument that he was a private figure was central to his counterclaim for negligent libel.

[42] On summary judgment the judge reviewed several allegedly defamatory statements disseminated to Astra employees, in press releases, via news conferences, and by other means. The judge determined as to most of these statements that they were either true or nondefamatory as a matter of law. As to statements

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Times v. Sullivan, 376 U.S. 254, 279-280, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (actual malice standard). *See also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) (describing limited purpose public figure); *Jones v. Taibbi*, 400 Mass. 786, 797-798, 512 N.E.2d 260 (1987) (same). Bildman claims, in essence, that he was a private figure thrust unwittingly into the public spotlight over a "private dispute" in which statements were negligently made that ruined his reputation. *See id.* at 797, 512 N.E.2d 260 (for private persons liability may be imposed "upon proof of negligent publication of a defamatory falsehood"). The judge did not err.

On appeal, Bildman's negligent libel claim focuses on the following statements: (a) a May 3, 1996, article in the Wall Street Journal in which an Astra spokesperson described Bildman as "not forthcoming" to Astra AB about the Business Week investigation; (b) a speech Mogren gave to Astra employees on May

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that might lend themselves to negligent libel claims, the judge ruled that Astra was entitled to summary judgment because Bildman, as a limited purpose public figure, would be unable to meet his burden at trial of proving the statements to have been made with actual malice. Bildman does not appeal from the judge's rulings as to malicious libel or libel per se, nor does he argue, as he did below, that summary judgment was improper by reasons of "defamation by conduct," *see, e.g., Alaska Statebank v. Fairco*, 674 P.2d 288, 294 (Alaska 1983) (plaintiff's conduct "was clearly defamatory despite the fact that the statement communicated by the repossession [of property] was not actually verbalized"), a theory that, as the judge noted, we have not recognized.

13, 1996, in which he stated, among other things: "[S]ome people have tried to put themselves above the rules, at the same time that they have made great efforts to cover up what has happened"; (c) a June 26, 1996, Astra news release and press release that made identical statements that, as Bildman summarizes on appeal, he "had engaged in inappropriate behavior at company functions, that he had disregarded company rules and procedures, that he had failed to keep the company apprised, that he had rented outside office space for the purpose of keeping information from the parent company, that he had used company funds for family vacations and that he had used approximately $2 million for personal expenses"; and (d) an Astra statement appearing in the February 5, 1998, Boston Globe that Bildman's "actions-asking people to destroy records and the like-are in our estimation an attempt to cover up and keep things from his superiors in the company."

Where facts are undisputed, the status of a libel plaintiff is a question of law for the judge. *Bowman v. Heller,* 420 Mass. 517, 522, 651 N.E.2d 369, cert. denied, 516 U.S. 1032, 116 S.Ct. 682, 133 L.Ed.2d 530 (1995). Here, the judge applied the two-part test of *Gertz v. Robert Welch, Inc., supra,* to determine whether Bildman was a limited purpose public figure. *See Bowman v. Heller, supra* at 524 n. 7, 651 N.E.2d 369 ("public controversy" must exist, and "the nature and extent of the individual's participation in the particular controversy" must be determined). The judge first considered whether the allegedly defamatory

statements involved a matter of public controversy. *See id.* The judge had little difficulty, as do we, concluding that the issue of widespread sexual harassment at a publicly traded company employing 1,000 people is a matter of general concern. Although Bildman argues that the serious allegations against him "were unlikely to be felt by persons not involved in the controversy," the issue of sexual harassment in the workplace is a focus of a considerable body of State and Federal law and regulation and a matter of frequent and often heated public debate.[43] The topic of Bildman's actions echoed far beyond Astra, its employees, and their families. For many months, it wove its way into the national and international discourse about permissible conduct in the workplace and the place and treatment of women in the private sector. *See, e.g.*, Sexual-Harassment Cases Trip Up Foreign Companies: Astra and Mitsubishi Handle Complaints Differently, But Both Hit Pitfalls, Wall St. J., May 9, 1996, at B4.

Second, the judge considered the nature and extent of Bildman's participation in the controversy. *See Bowman v. Heller, supra* at 523 n. 7, 651 N.E.2d 369. Here she found, on the undisputed record, that

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[43] Although the judge did not identify the dispute between Astra and Bildman as evidencing matters of public concern other than sexual harassment, the parties' dispute might be said to reflect other issues of general interest, such as corporate integrity, corporate governance, and corporate financial controls, among others, all of which have attracted much recent media attention.

Bildman was neither a victim nor an unwitting participant in the broad media coverage of his dispute with Astra.[44]

In each instance, Bildman or his counsel denounced Astra in unequivocal terms. "Since the beginning of this case, I and my family have been outraged at the irresponsible allegations that have been made against me," Bildman is quoted as saying in a press release issued by his counsel on June 4, 1996. In a press release of June 26, 1996, Bildman's counsel denounces "the company's allegations of financial wrongdoing by Lars Bildman," "scurrilous and untrue allegations brought by disgruntled former employees," and a "'star chamber' investigation" by Astra of Bildman.[45] These remarks are fairly typical

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[44] The judge found that Bildman, through counsel, repeatedly contacted and used the media, including Business Week, the Boston Globe, and the Boston Herald, to comment on the investigation, deny and rebut Astra's allegations, and influence the resolution of the investigation in the public eye. In addition, Bildman sent press releases to various media outlets, including the New York Times, Wall Street Journal, Reuters, United Press, New England Cable News, CBS News, WCVB-TV, WLVI-TV, and WHDH-TV in Boston. Bildman also entered into unsuccessful negotiations with CBS News to be interviewed on its evening news program in New York and appeared in an interview on a Swedish television program.

[45] To the extent that Bildman claims that he acted as a private person because he struck back at Astra only after the company had begun to defame him, it does not pass notice that Bildman began assembling a public relations team in mid-December to influence information disseminated by and to both Business Week and Astra AB, months before Astra AB learned

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of Bildman's thrust and parry. His is not a case in which the libel plaintiff is a "bit player" in a media drama created by forces over which he had no control. Bildman played a central role, with "access to the channels of effective communication" that most private individuals do not enjoy. *See Gertz v. Robert Welch, Inc., supra* at 344, 94 S.Ct. 2997 (noting that private individuals generally do not have same access to media as public figures). It is "readily apparent" to us, as it was to the judge, that Bildman "palpably engineered efforts to project himself into the public limelight." *Tripoli v. Boston Herald-Traveler Corp.*, 359 Mass. 150, 156, 268 N.E.2d 350 (1971).

Because the judge correctly concluded that Bildman was a limited purpose public figure in relation to the allegedly defamatory statements, she correctly awarded summary judgment to Astra on his negligent libel claims.

8. *Conclusion.* For the foregoing reasons, we affirm the judgments against Astra on the issues of rescission and costs of investigation, and against Bildman on the issues of attorney's fees and libel. We reverse the judgment denying Astra recovery of compensation it paid to Bildman during the period of his disloyalty – $5,599,097 in salary and $1,180,000 in

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of, much less spoke publicly about, his wrongdoing at the company. We add that the media storm that swept over Bildman originated in his own wrongful conduct as a corporate officer and director beginning years before Business Week began its investigation.

bonuses. We affirm the jury's verdict awarding Bildman $203,691 in damages related to the supplemental stock grant, because on appeal Astra has waived any claim of forfeiture of that award.

We remand the case to the Superior Court for entry of judgments consistent with this opinion.

So ordered.

2006 WL 760283 (Mass.Super.)

Superior Court of Massachusetts,
Suffolk County.
ASTRA USA, INC.
v.
Lars BILDMAN.[1]

Lars Bildman
v.
Hakan Mogren et al.[2]

Nos. 980580C, 991942G.

Jan. 26, 2006.

FINDINGS OF FACT, RULINGS OF LAW AND ORDER ON THE EQUITABLE FORFEITURE CLAIM OF ASTRA USA, INC. AGAINST LARS BILDMAN

MARGARET R. HINKLE, Justice.

On February 21, 2002, after a seven-week trial, a jury found that Lars Bildman ("Bildman") defrauded Astra USA, Inc. ("Astra" or "Astra USA") and converted Astra funds. For this conduct, the jury awarded Astra $875,512 in damages. The jury also found that Bildman wasted the assets of Astra, causing Astra $1,040,812 in damages. Further, the jury found that Bildman breached his fiduciary duty to Astra by making affirmative misrepresentations while he was its President and CEO, failing to

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[1] Carl-Gustaf Johansson.

[2] Carl-Gustaf Johansson.

disclose material information he had a duty to disclose, and improperly using Astra funds. The jury found that this conduct was a substantial factor in causing harm to Astra, and, as a result, Astra was entitled to $1,040,812 in damages. The jury found that its damages awards overlapped, and that, without overlapping, Astra was entitled to a total of $1,040,812 in damages from Bildman. The jury also found that Bildman engaged in sexual harassment, violated Astra's sexual harassment policy, and retaliated against one or more Astra employees who exercised their right to make a complaint under Astra's sexual harassment policy.[3] The jury made other findings not relevant to the equitable forfeiture matter pending before the Court.

At trial I reserved on Astra's equitable forfeiture claim. Now, following a bench trial on that claim,[4] I make the following findings of fact and rulings of law.

Findings of Fact

1. At all relevant times, Astra AB was a Swedish pharmaceutical company, publicly traded on the New York Stock Exchange. By the 1990s, Astra AB had become the fastest growing drug company in

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[3] These findings were not made in the context of Astra's fiduciary duty claim.

[4] With the parties' consent, direct examination of all live trial witnesses except Neal Tully, Esq. was presented by affidavit.

the world. Astra AB had subsidiary companies throughout the world, including research companies, which developed new drug products, and marketing companies, which marketed and sold Astra products. The subsidiaries and Astra AB constituted what was often referred to as the "Astra Group."

2. Astra AB also had independent licensees around the world, to which Astra AB licensed the rights to sell its products in certain markets. The licensees were typically competitor drug companies with which Astra AB teamed to sell its products. Under licensing arrangements, Astra AB shared with the licensee the revenue received upon the sale of the product.

3. The world pharmaceutical market consists of generic multi-source and patented single-source products. Sales of single-source patented products typically have higher gross margins than sales of generic multi-source products.

4. Astra AB is a research-intensive company with a product portfolio dominated by high-margin patented drugs.

5. At all relevant times, the United States was the biggest pharmaceutical market in the world. The prescription drug market in the United States has two primary sectors: the hospital sector and the outpatient or office-based physician sector, also referred to as the general practitioner market ("the GP market"). At relevant times, the hospital sector represented about 10 percent of the total American

prescription drug market, with the remaining 90 percent in the GP market.

6. In the American market, Astra AB previously out-licensed all its major patented drugs aimed at the GP market. In particular, in the early 1980s, Astra entered into a license agreement with Merck which gave Merck the exclusive first right to all Astra AB original research products in the GP market in the United States. This agreement was known as the Astra-Merck joint venture.

7. Throughout the 1980s and 1990s, Astra USA was unable to sell any Astra AB patented drugs in the United States unless the licensee chose not to exercise its right to sell a particular drug. Thus, Astra USA was limited to multi-source generic products, with low margins, in the hospital sector.

8. Lars Bildman served as President and Chief Executive Officer of Astra USA, Inc. ("Astra") from 1991 though his termination in 1996. Bildman began his employment at Astra AB in 1972. In 1976, he became Vice President of Administration and Finance for Astra Germany, where he was promoted to Executive Vice President in 1979.

9. In 1980, Bildman was asked by the then-President and CEO of Astra AB to become President and CEO of Astra Pharmaceuticals, the American subsidiary of Astra AB, which later became Astra USA, Inc. At this time, the U.S. subsidiary was the only Astra AB subsidiary operating at a loss.

10. After Bildman became President and CEO of Astra, he made significant management changes: he brought in a new management team, implemented a new business strategy, and laid off almost half the work force.

11. Around 1988, Hakan Mogren ("Mogren") was appointed President and CEO of Astra AB. Among other things, Mogren reorganized Astra AB's subsidiaries into geographical regions with Astra USA becoming a part of the "Americas" region.

12. Around this time, Astra AB's goal became expansion of its presence in the United States GP market through its own sales organization rather than through license agreements. Mogren established a special task force, which included Bildman, to investigate different ways to achieve independence from licensees in the United States market.

13. The task force investigated different strategies for achieving a wholly-owned presence in the GP market and determined among other things, that a marketing and sales organization and resources for medical and clinical research were critical to expansion.

14. To that end, Mogren directed task force members to initiate talks with Merck to learn whether Merck had any interest in dissolving its joint venture with Astra, and, if so, at what price.

15. The task force investigated alternatives for expansion into the GP market, including: (1) out-licensing of future original Astra AB research

products through licensees; (2) acquisition of a company already present in the GP market with a large sales force; or (3) internal organic growth of a new sales force and marketing organization with research capabilities.

16. Mogren rejected the out-licensing alternative because it would not provide Astra a complete pay-back on its research investments.

17. For fiscal reasons, Mogren also rejected the acquisition alternative.

18. Mogren formally adopted a new strategic mission for Astra AB in the United States to develop a new outpatient division to penetrate the GP market. The directors of both Astra AB and Astra USA approved this strategy.

19. As a result of this strategy, unlike all other Astra subsidiaries, Astra USA's strategic mission for the period 1991 to 1996 was less to contribute financially to its parent and more to create a new organization prepared to launch Astra AB high-margin research products in the local GP market.

20. To implement Astra AB's new United States strategy, Astra USA organized its operation into two divisions: the Hospital Division, which conducted business in the traditional hospital market, and a new Rx Division, to conduct business in the larger, more profitable GP market.

21. Astra AB recognized that the expansion of the Rx Division in the U.S. would negatively impact

the consolidated total financial contribution reported by Astra. The Astra Group used the term "total contribution" in its financial reporting as a measure of subsidiary profitability. Total contribution is essentially the equivalent of gross profit.

22. Astra AB decided to finance development of the Rx Division largely through revenues generated by the Hospital Division. In 1991, Astra USA launched development of the Rx Division, using capital from the Hospital Division.

23. Building the Rx Division required hiring and training an entire new sales force to conduct office-based sales. The plan was to build a sales force of about 500 individuals in the Rx Division by 1995. To that end, Astra USA recruited and built a national sales force and implemented new sales and marketing strategies.

24. Around this time, Astra USA decided to launch the sale of two generic drugs, Toprol-XL and Rhinocort Aqua, in the GP market to prepare the sales force for the major anticipated launch of Pulmicort Turbuhaler ("Pulmicort"). Pulmicort was a highly-successful patented research drug of Astra AB, which its subsidiaries in other world markets had been successfully selling throughout the early 1990s.

25. Since Merck had decided not to sell Pulmicort in the United States, it was available to Astra USA to sell in the United States market, but Astra USA lacked a sales force to sell the product.

26. Although the Hospital Division continued to generate significant revenue, the consolidated total contribution of Astra USA to Astra AB was near zero from the start-up of the Rx Division. Astra AB's objective was to have the Rx Division begin to generate a positive cash flow through Pulmicort Turbuhaler.

27. In its 1991-96 Annual Reports, Astra AB advertised creation of the new Astra USA Rx Division and anticipated a major launch of Pulmicort Turbuhaler within that division.

28. Each year, Astra AB subsidiaries generated a Marketing Company Plan in which each subsidiary outlined its business strategy for the next three years, with the first year as a budget, and reported financial and sales performance for the prior year.

29. From 1991 to 1996, each budget and Marketing Company Plan for Astra USA included projections for the Rx Division and implemented the new strategy for Astra USA in the local market.

30. Every budget and plan for each division and the consolidated plan for Astra USA reflected this agreed-upon financing arrangement for the Rx division. The Astra AB and the Astra USA directors reviewed and approved all Marketing Company Plans and budgets, which included projected losses for the Rx Division for its first years until the launch of Pulmicort Turbuhaler, and a lowered consolidated total contribution by Astra USA.

31. Astra USA's overhead costs increased with the development of the Rx Division, which impacted Astra USA's profit and consolidated total contribution.

32. Astra USA's contribution to Astra AB, which was 2% of Astra AB's net profit in 1991, declined to only .6% by the end of 1995. Even though Astra USA's sales increased during this period, its growth lagged behind that of the Astra Group as a whole from 1991 to 1995. Astra USA's net profit was essentially the same at the end of 1995 (105 million Swedish Kroner) as it had been at the end of 1991 (102.9 million Swedish Kroner). This contrasted with the growth in profitability of other Astra AB subsidiaries.

33. In the 1990s, Astra AB launched a patented drug called Losec. By the mid-1990s, Losec was the most profitable drug sold by Astra AB and, at one point, the world's largest selling drug. During 1991 to 1996, Merck had exclusive rights to sell Losec in the United States under its joint venture agreement with Astra. In its Annual Reports, Astra AB reported that the profitability of its subsidiaries was a direct result of the sale of Losec. Stated variously, the subsidiaries which out-performed Astra USA in total contribution during 1991 to 1996 had access to Losec, and Astra USA's inability to sell Losec hampered its total contribution.

34. Under Bildman's tutelage, Astra USA became profitable in three years and reestablished its position in the local anesthetics market. At the time,

the local anesthetic world market was dominated by three Astra AB products: Xylocaine, Marcaine, and Carbocaine. Of these products, Astra USA had the right to sell only Xylocaine. Unlike all other Astra AB subsidiaries, Astra USA had no access to Marcaine and Carbocaine because Astra AB had out-licensed Marcaine and Carbocaine in the United States to Astra USA's major competitor.

35. Astra USA's market shares for all its major hospital products grew during 1991-96. Despite being restricted to selling mainly generic local anesthetics, Astra USA continued to grow in market share.

36. However, Astra USA's share in the so-called local anesthetics market was lower than the share of the local anesthetics market of Astra AB as a whole and less than that of numerous Astra AB subsidiaries. Put another way, Astra AB's share of the local anesthetics market in the world, and the share of numerous Astra AB subsidiaries in their respective local anesthetic market, was considerably greater than Astra USA's share of the American local anesthetics market.

37. In the new Rx Division, Astra USA successfully launched two products in the GP market during 1991 to 1996 for training purposes. In 1992, Astra USA launched ToprolXL and in 1994, Astra USA launched Rhinocort Aqua. Toprol-XL and Rhinocort were generic versions of products previously in the United States market.

38. By 1995, both Rhinocort and Toprol-XL showed growth in their respective market segments and increased revenues significantly. At the same time, the Hospital Division continued to be profitable for Astra USA with increased market share and profits.

39. As conceded by Bildman, the Rx Division lost money each year.

40. During 1991 to 1996, Astra USA met or exceeded its financial commitments to the Astra Group outlined in the Marketing Company Plans and budgets.

41. In its Annual Reports during 1991 to 1996, Astra AB praised the growth and performance of Astra USA.

42. In the 1991 Annual Report, Astra AB reported that the trend for the Hospital Division of Astra USA was "highly favorable" with a 30% increase in sales.

43. In the 1992 Annual Report, Astra AB reported that Astra USA's sales rose 19%, with sales in the local anesthetic group adversely affected by changes in product range.

44. In the 1993 Annual Report, Astra AB reported that sales at Astra USA rose 20%, attributed in part to the early success in the sales of Toprol-XL.

45. In the 1994 Annual Report, Astra AB reported that sales at Astra USA rose 13%, and

noted the successful launch of both Toprol-XL and Rhinocort in the Rx Division.

46. In the 1995 Annual Report, Astra AB reported that Astra USA had been strengthened by the addition of the Rx Division and successful launches of Toprol-XL and Rhinocort. Astra AB reported "rapid development" for Astra USA in 1995, with Toprol and Rhinocort leading growth in their respective market segments.

47. In the 1996 Annual Report, Astra AB again reported rapid growth of Astra USA with the successful launches of Toprol-XL and Rhinocort. The report also anticipated the launch of Pulmicort through the Rx Division.

48. Neal Tully, Secretary to the Astra USA Board of Directors from 1991-1996, testified that Mogren and other Astra AB executives consistently praised Bildman for the success of Astra USA. I credit that testimony and conclude that Bildman's tenure at Astra USA was highly successful with the exception of the serious matters that gave rise to his termination and this litigation.

49. Louis Lasagna, Chairman of the Astra USA Board of Directors during the relevant time period, often praised Bildman for his leadership of Astra USA. For example, at the directors' meeting held on December 6, 1995, at which Mogren was present, Lasagna stated that Bildman and his management team had completed "a tremendous year."

50. By 1995, Astra USA had successfully built the Rx Division and was ready to market and sell Pulmicort Turbuhaler once that drug was approved by the FDA.

51. Astra USA had budgeted and planned to launch Pulmicort Turbuhaler as Astra AB's first major drug marketed by a wholly-owned Astra subsidiary on the American market without a local marketing and sales partner.

52. However, in early 1995, the FDA denied Astra's application for Pulmicort largely because, in the application, Astra AB submitted test results from a different product to support the application. As a result, Pulmicort was not brought to market during Bildman's tenure.

53. At the time of Bildman's suspension in 1996, the net profits of Astra AB subsidiaries operating in smaller markets than Astra USA exceeded those of Astra USA. For example, Astra Belgium's net profits were three times greater than those of Astra USA; Astra Netherlands and Astra Australia generated net profits eight times greater, and Astra Germany's net profits were 22 times greater. Astra USA's relative performance was largely attributable to the other subsidiaries' ability to sell Losec, which, as noted, Astra USA could not sell, and to the fact that other subsidiaries were able to bring the Pulmicourt Turbuhaler to market.

54. Around 1985, Astra AB instituted a worldwide profit sharing plan. Each subsidiary was

provided grants based upon the number of employees. The funds allocated to each subsidiary were based upon the financial performance of Astra AB and not that of the subsidiary. Each subsidiary CEO had authority to use the funds in a manner best fitting his company's overall goals, recognizing local conditions.

55. In contrast to all other participating subsidiaries, Astra USA under Bildman permitted all employees at Astra USA to share equally in its profit sharing plan. Thus, Bildman received a smaller grant than any other CEO of the Astra Group. Each employee of Astra USA received yearly payments as a participant in the profit sharing plan. This plan was not dependent upon the performance of individual employees or individual subsidiaries.

56. Beginning in 1981, Astra USA, with the approval of Astra AB, implemented an annual bonus for the entire management team of Astra USA, including Bildman. This bonus program was in effect through 1996. The Astra USA bonus program was based on the performance of Astra USA, and not on individual performance.

57. After discussions and agreement with Bildman, Astra AB set the yearly performance goals for Astra USA and the corresponding size of the bonus pool. Astra AB also established Bildman's share in the bonus pool.

58. Bildman received a bonus for each year that Astra USA exceeded its bonus targets. During the

period 1982 to 1996, only in 1987 did Astra USA fail to achieve the yearly target of Astra AB.

59. Around 1991, Astra USA began exploring implementation of a long-term stock grant program to attract management-level employees.

60. Astra USA and Astra AB retained executive consultants to analyze Bildman's compensation in conjunction with the stock plan review.

61. Attorney Tully, Astra USA's board secretary, reported to Astra AB that although Bildman's short-term compensation (salary and bonus) was within 10% of industry standards, Bildman's overall compensation was not competitive with similar executives and was 50% less than industry standards due to the lack of a long-term plan.

62. In or around 1993, Astra AB implemented a long-term compensation program at Astra USA using grants of Astra AB stock. Under this program. Astra AB granted Bildman shares of Astra AB stock according to a vesting schedule. Due to his termination Bildman did not receive his entire long-term compensation. He forfeited 3,275 shares of Astra AB stock granted in 1996, 4,767 shares granted in 1995, 5,439 shares granted in 1994, and 3,770 shares granted in 1993.

63. In addition to serving as CEO and President of Astra USA, Bildman also served as a director of Astra USA and Astra Germany.

64. In 1991, Astra paid Bildman a total of $928,751.60, including a bonus of $300,000. In 1992, it paid him $893,098.18, including a bonus of $300,000. In 1993, it paid him $955,348.56, including a bonus of $200,000. In 1994, it paid him $848,824.61, including a bonus of $180,000. In 1995, it paid him $1,028,583.75, including a bonus of $200,000. In 1996, it paid him $944,490.50, and awarded him a supplemental stock grant valued at $203,691 in March of that year.

Rulings of Law

Because of the jury findings in favor of Astra on its breach of fiduciary duty claim, Astra now seeks equitable relief in the form of forfeiture of Bildman's compensation for the years 1991 through 1996. This Court previously ruled that Massachusetts' three-year limitations period for breach of fiduciary duty claims applies to Astra's forfeiture claim. However, because Bildman failed to plead a statute of limitations defense in his answer or amended answer, I find and rule that he has waived this defense. See Mass.R.Civ.P. 8(c).

Because Astra is a New York corporation, New York law governs its claim for forfeiture. See *Harrison v. NetCentric Corp.*, 433 Mass. 465, 470-71, 744 N.E.2d 622 (2001) (law of state of incorporation governs matters relating to internal affairs of corporation, including breach of fiduciary duty). Under New York law, an individual who owes a duty

of fidelity to a principal and is faithless in the performance of his services is generally disentitled to recover his compensation, whether or not his services benefitted the principal and even if the principal suffered no damages by reason of his breach of duty. *Royal Carbo Corp. v. Flameguard, Inc.,* 229 A.D.2d 430, 645 N.Y.S.2d 18, 19 (N.Y.A.D. 2 Dept.1996); *Feiger v. Iral Jewelry, Ltd.,* 41 N.Y.2d 928, 394 N.Y.S.2d 626, 626, 363 N.E.2d 350 (N.Y.1977); *Lamdin v. Surface Advertising Corp.,* 272 N.Y. 133, 138, 5 N.E.2d 66 (N.Y.1936).

In a May 4, 2005 Memorandum of Decision, this Court recognized that Astra may be entitled to forfeiture of Bildman's salary and bonuses during his period of disloyalty, depending on my findings and rulings in this decision. A fiduciary is generally required to repay only the portion of his compensation in excess of the worth of his services. See *Meehan v. Shaughnessy,* 404 Mass. 419, 440, 535 N.E.2d 1255 (1989); *Chelsea Industries, Inc. v. Gaffney,* 389 Mass. 1, 14, 449 N.E.2d 320 (1983). "This limitation stems from the premise that the forfeiture remedy is not a penalty but really reimbursement of payment for services not properly performed . . . Therefore, compensation is often apportioned in relation to the services indeed properly performed." *In re Tri-Star Technologies Co., Inc.,* 257 B.R. 629, 636 (Bankr.D.Mass.2001). See *Anderson Corp. v. Blanch,* 340 Mass. 43, 51, 162 N.E.2d 825 (1959); *Lydia E. Pinkham Medicine Co. v. Gove,* 303 Mass. 1, 4, 20 N.E.2d 482 (1939).

The fiduciary bears the burden of proving the fair value of his services during the time he engaged in disloyal conduct; if he fails to do so, it is appropriate to forfeit his entire compensation. See *Chelsea Industries, Inc. v. Gaffney,* 389 Mass. at 14, 449 N.E.2d 320. The extent of equitable forfeiture of compensation is left to the sound discretion of the trial court, with reference to the peculiar factors found to be present in the case, including the nature of the conduct and whether the breach was egregious, whether the breach caused actual injury to the corporation, and the extent to which the improper activities diverted the fiduciary's time and energy from his corporate responsibilities. See *Anderson Corp. v. Blanch,* 340 Mass. at 50-51, 162 N.E.2d 825; *Production Machine Co. v. Howe,* 327 Mass. 372, 378-79, 99 N.E.2d 32 (1951); *In re Tri-Star Technologies Co., Inc.,* 257 B.R. at 637 & n. 10.

Here, Bildman's breach of fiduciary duty constitutes serious misconduct. In weighing the equities, however, this court considers that some of Bildman's unsavory behavior may have been in keeping with Astra's corporate culture at the time in question, and tolerated, at least for a time, by the directors. See *Design Strategies, Inc. v. Davis,* 384 F.Sup [sic].2d 649, 661-62 (S.D.N.Y.2005) (noting that one line of cases under New York law suggests that disloyal employee need not forfeit promised compensation when misconduct does not substantially violate contract of service, and disloyalty may not be substantial

where it consists of single act or where employer knew of and tolerated the behavior).

As found by the jury, Bildman's breach of fiduciary duty caused actual injury to Astra, for which the company was compensated by the jury's award of more than a million dollars in damages. Astra argues that in measuring the magnitude of the harm Bildman caused, this court should include the $905,080.06 paid by Astra's Board of Directors to the law firm of Winthrop Stimson to investigate Bildman's misconduct after the Board learned in April of 1996, through a *Business Week* article, that some Astra employees alleged sexual harassment by Bildman and other senior managers. This Court agrees, without delving into the particulars, that the fact that Astra was forced to spend time and money investigating Bildman is harm to be considered in weighing the equities of forfeiture.[5]

However, I am unpersuaded that Bildman's conduct was a substantial factor in causing Astra harm with respect to Astra's settlement with the Equal Employment Opportunity Commission ("EEOC"). On February 5, 1998, the EEOC filed a complaint against Astra, alleging, among other things, that "Astra management officials, including but not limited to,

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[5] This Court rejects, however, any renewed attempt by Astra to recover the costs of the investigation as damages, an offset, or otherwise. This Court has addressed that issue on several prior occasions.

Lars Bildman and George Roadman, used their authority and positions in the Company to engage in . . . sexual harassment," and that Astra under Bildman maintained a "hostile work environment." On February 5, 1998, the EEOC and Astra entered into a Consent Decree, approved by a local federal judge. Under the Consent Decree, Astra paid $9.85 million into a fund to be used to pay individuals who demonstrated to a Special Master that they had claims against Astra for sexual harassment. The Special Master was appointed to review the claims, determine eligibility for payment under the terms of the Consent Decree, and make awards. The Special Master did not conduct evidentiary hearings on the claims or contact Bildman or others whose conduct formed the basis of these claims to contest the claims if they desired. Therefore, it would be unfair for this Court in this litigation to use the EEOC settlement as evidence of Bildman's harm to Astra, particularly since Astra concedes that the Consent Decree did not constitute an adjudication of the validity of the claimants' allegations against Bildman. Accordingly, I do not consider the EEOC settlement as harm caused by Bildman in weighing the equities of forfeiture.

Another relevant consideration is the extent to which the improper activities diverted the fiduciary's time and energy from his corporate responsibilities. Here, I find and rule that Bildman's breach of fiduciary duty did not substantially divert his time or energy from Astra, cause his productivity to wane, or

affect the normal operations of Astra. See *Meehan v. Shaughnessy,* 404 Mass. at 440, 535 N.E.2d 1255 (no forfeiture where attorneys who were secretly preparing to compete with their firm and unfairly took clients with them were as productive during period of breach as they had always been). Rather, I conclude that Bildman at all relevant times worked primarily to advance Astra's interests and that he successfully implemented Astra's business strategy for the period from 1991 to 1996. Cf. *Aramony v. United Way of America,* 28 F.Sup [sic].2d 147, 176 (S.D.N.Y.1998), aff'd in part, rev'd in part on other grounds, 191 F.3d 140 (2d Cir.1999) (President/CEO of United Way convicted of embezzlement had to forfeit $951,250 in salary paid while he breached fiduciary duty; although he was responsible for United Way's rise to prominence during that period, his fraudulent diversion of assets squandered millions of dollars in contributions intended to benefit neediest members of society, undermining non-profit's mission and possibly damaging public confidence).

Weighing the relevant factors, and without minimizing the serious breach of fiduciary duty committed by Bildman, this Court concludes that Bildman has met his burden of proving the fair value of his services during the period from 1991 through 1996, and that he earned his compensation in each of those years despite his breach. Cf. *Boston Children's Heart v. Nadal-Ginard,* 73 F.3d 429, 436 (1st Cir.1996) (forfeiture of compensation warranted where fiduciary did not establish value of his services

because evidence was speculative, conflicting, and relied on self-aggrandizing statements). Bildman's breach of fiduciary duty did not negate his otherwise proper performance as President and CEO of Astra USA, and the forfeiture of salary now sought by Astra would impose a penalty on Bildman which I conclude would be disproportionately harsh under all the circumstances. This Court, in its discretion, therefore rules that Astra is not entitled in equity to reimbursement of the salary paid to Bildman during the relevant period, insofar as he earned that salary by providing valuable services despite his breach of fiduciary duty.

Lastly, the bonuses paid to Bildman between 1991 and 1995 were compensation based not on his individual performance but on the performance of Astra USA. As discussed above, under Bildman's leadership Astra USA succeeded in its mission to launch the Rx Division. Given the undisputed evidence that Astra USA met its performance goals in the years at issue, I conclude that Bildman has satisfied his burden to show that he provided valuable services and earned his bonuses. Accordingly, despite Bildman's serious breach of fiduciary duty, Astra is not entitled in equity to reimbursement of the bonuses paid to Bildman between 1991 and 1995.

ORDER

Based on the foregoing findings of fact and rulings of law, it is hereby *ORDERED* that Astra

USA, Inc., is not entitled to equitable forfeiture of the salary and bonuses paid to Lars Bildman between 1991 and 1996.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPERIOR COURT**
CIVIL ACTION
NOS. 98-0580-C
99-1942-G
[CONSOLIDATED]
(Specially Assigned to Judge Hinkle)

ASTRA USA, INC.,
Plaintiff,
v.
LARS BILDMAN,
Defendant,
v.
ASTRA AB, HAKAN MOGREN and CARL-GUSTAF JOHANSSON,
Third-Party Defendants.

LARS BILDMAN,
Plaintiff,
v.
HAKAN MOGREN and CARL-GUSTAF JOHANSSON,
Defendants.

FINAL JUDGMENT

All issues have now been tried in these consolidated cases. Specifically, the jury has rendered its verdict on special questions, and the Court has rendered pre-verdict orders dismissing and otherwise disposing of certain claims and post-verdict orders on the remaining issues. Therefore, judgment shall enter as follows:

I. Claims, Counter-Claims and Third Party Claims.

A. Plaintiff Astra USA, Inc.'s Claim Against Defendant Lars Bildman (C.A. 98-0580).

1. Count I (Fraud) – Judgment shall enter in favor of Astra USA, Inc. ("Astra").

2. Count II (Breach of Fiduciary Duty and the Duties of Good Faith and Loyalty) – Judgment shall enter in favor of Astra.

3. Count III (Waste of Corporate Assets) – Judgment shall enter in favor of Astra.

4. Count IV (Rescission) – Judgment shall enter in favor of Lars Bildman.

5. Count V (Conversion) – Judgment shall enter in favor of Astra.

6 Damages are awarded on Counts I-III and V in favor of Astra and against Lars Bildman in the amount of $1,040,812, plus interest and costs.

B. Plaintiff-in-Counterclaim Lars Bildman's Claims Against Defendant-In-Counterclaim Astra USA, Inc. (C.A. 98-8580).

7. Count I (Breach of contract) – Judgment shall enter in favor of Astra.

8. Count II (Fair Wage Practices) – Judgment shall enter in favor of Astra.

9. Count III (Indemnification for Cost and Expenses incurred in this Action) – Judgment shall enter in favor of Astra.

10. Count IV (Indemnification for Costs and Expenses incurred in Defending Criminal Action) – Judgment shall enter in favor of Astra.

11. Count V (Libel-Malice) – Judgment shall enter in favor of Astra.

12. Count VI (Libel-Negligence) – Judgment shall enter in favor of Astra.

13. Count VII (Libel-Per Se) – Judgment shall enter in favor of Astra.

C. Third-Party Plaintiff Lars Bildman's Claims Against Third-Party Defendants Hakan Mogren and Carl-Gustaf Johansson (C.A. 98-0580).

14. Count V (Libel-Malice) – Judgment shall enter in favor of Hakan Mogren and Carl-Gustaf Johansson.

15. Count VI (Libel-Negligence) – Judgment shall enter in favor of Hakan Mogren and Carl-Gustaf Johansson.

16. Count VII (Libel-Per Se) – Judgment shall enter in favor of Hakan Mogren and Carl-Gustaf Johansson.

D. Third-Party Plaintiff Lars Bildman's Claim Against Third-Party Defendant Astra AB (C.A. 98-0580).

17. Count I (Breach of Contract) – Judgment shall enter in favor of Astra AB.

18. Count II (Fair Wage Practices) – Judgment shall enter in favor of Astra AB.

19. Count III (Indemnification for Cost and Expenses incurred in this Action) – Judgment shall enter in favor of Astra AB.

20. Count IV (Indemnification for Costs and Expenses Incurred in Defending Criminal Action) - Judgment shall enter to favor of Astra AB.

21. Count V (Libel-Malice) – Judgment shall enter in favor of Astra AB.

22. Count VI (Libel-Negligence) – Judgment shall enter in favor of Astra AB.

23. Count VII (Libel-Per Se) – Judgment shall enter in favor of Astra AB.

E. Plaintiff Lars Bildman's Claims Against Hakan Mogren and Carl-Gustaf Johansson (C.A. 99-1942).

24. Count I (Intentional Interference with Contractual Relations) – Judgment shall enter in favor of Hakan Mogren and Carl-Gustaf Johansson.

25. Count II (Intentional Infliction of Emotional Distress) – Judgment shall enter in favor of Hakan Mogren and Carl-Gustaf Johansson

II. Damages and Equitable Relief

A. Supplemental Stock Grant.

26. Judgment shall enter that Lars Bildman did not fraudulently induce Astra to enter into the March 1996 supplemental stock grant and that Bildman is entitled to recover from Astra the amount of $203,691 under the March 1996 supplemental stock grant subject to Astra's right of set-off discussed below.

B. Set-Off.

27. Judgment shall enter that Astra may set-off $203,691, the amount that Lars Bildman is entitled to recover from Astra under the March 1996 supplemental stock grant, from $1,040,812, the amount Astra is entitled to recover from Lars Bildman as set forth in paragraph I.A. 6 above. After this set-off, Astra shall recover from Lars Bildman damages in the net amount, after set-off, of $837,121, with interest and costs.

C. Equitable Forfeiture.

28. Judgment shall enter in favor of Lars Bildman on Astra's claims for equitable forfeiture, punitive damages and additional compensatory damages as equitable relief.

SO ORDERED.

/s/ Margaret R. Hinkle
Margaret R. Hinkle,
Justice of the Superior Court

DATE: January 25, 2006

– Original Message –

From: SJCCommClerk@sjc.state.ma.us
[mailto:SJCCommClerk@sjc.state.ma.us)

Sent: Thursday, December 03, 2009 6:00 PM
To: Michael C. Fee
Subject: SJC-10361 –
Notice: Petition for Rehearing Denied

Supreme Judicial Court for
the Commonwealth of Massachusetts
John Adams Courthouse
One Pemberton Square, Suite 1400,
Boston, Massachusetts 02108-1724
Telephone 617-557-1020, Fax 617-557-1145

RE: No. SJC-10361

ASTRA USA, INC.

vs.

LARS P.E. BILDMAN;
CARL-GUSTAF JOHANSSON & others,
third-party defendants (and a companion case)

NOTICE OF DENIAL OF
PETITION FOR REHEARING

The Petition for Rehearing filed in the above captioned case has been considered by the Court (Cordy, Gants, JJ., recused) and is denied.

Susan Mellen, Clerk

Dated: December 3, 2009

To: Joseph D. Lipchitz, Esquire
Michael C. Fee, Esquire
Michael D. Weisman, Esquire
Suffolk Superior Court Dept.
Jonathan M. Albano, Esquire
Atty. David E. McCraw

Supreme Court, U.S.
FILED
APR 2 - 2010
OFFICE OF THE CLERK

No. 09-1057

IN THE

Supreme Court of the United States

LARS P. E. BILDMAN,
Petitioner,

v.

ASTRA USA, INC.,
Respondent.

On Petition For A Writ Of Certiorari To The Massachusetts Supreme Judicial Court

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

JEFFREY S. ROBBINS
A. W. PHINNEY, III*
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**Counsel of Record for Respondent*

April 2, 2010

WILSON-EPES PRINTING CO , INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether the Massachusetts Supreme Judicial Court erred in applying this Court's precedent to the record in this case and ruling that Petitioner, the former Chief Executive Officer of a major pharmaceutical company who had first assembled a team of public relations consultants to manage an emerging *BusinessWeek* cover story about his misconduct and then, after publication of the *BusinessWeek* story and widespread media stories about former employees' public allegations against him and an EEOC investigation, contacted media outlets to comment on the controversy, qualified as a limited purpose public figure with respect to this matter.

2. Whether by failing to raise his argument that corporations are not entitled to First Amendment protection in the Massachusetts courts, Petitioner has waived his right to raise that argument here, and whether, even if not waived, his argument is erroneous.

3. Whether, even if the Supreme Judicial Court had erred in applying this Court's limited purpose public figure precedent to the record before it, there were adequate and independent state grounds under Massachusetts law for the judgment in favor of Respondent on Petitioner's negligent libel claims.

PARTIES TO THE PROCEEDING

The Petitioner in this case is Lars P.E. Bildman, who was Astra USA, Inc.'s President and Chief Executive Officer from 1981 until his termination in 1996. The Respondent is Astra USA, Inc. ("Astra"), which at all relevant times during the underlying litigation was a wholly-owned American subsidiary of Astra AB, a Swedish publicly-traded company.

Although Bildman brought claims in the trial court against Astra AB and two of its corporate officers, as well as Astra, the trial court dismissed Astra AB as a party before summary judgment for lack of personal jurisdiction. The two officers were Dr. Haken Mogren and Carl-Gustaf Johansson, who were also members of Astra's Board of Directors. Bildman sued them for libel and tortious interference with contractual relations. The trial court dismissed the libel claims against Mogren and Johansson at summary judgment. At trial, the jury found in favor of Mogren and Johansson on Bildman's tortious interference claims.

In his Amended Notice of Appeal dated October 24, 2007, which was filed with the Massachusetts Appeals Court, Bildman withdrew his appeal of the various rulings and judgments in favor of Astra AB, Mogren and Johansson. As a result, only Astra and Bildman were parties to the appeal before the Massachusetts Supreme Judicial Court and are the only parties before this Court.

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, Respondent Astra USA, Inc. states that it is a wholly-owned subsidiary of AstraZeneca Treasury Limited, which is, in turn, owned by AstraZeneca UK Limited, a subsidiary of AstraZeneca Intermediate Holdings Limited. AstraZeneca PLC, a publicly-traded company, owns AstraZeneca Intermediate Holdings Limited and, through the subsidiaries identified above, indirectly controls more than 10% of the stock of Astra USA, Inc.

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IN THE

Supreme Court of the United States

No. 09-1057

LARS P. E. BILDMAN,
Petitioner,

v.

ASTRA USA, INC.,
Respondent.

On Petition For A Writ Of Certiorari To The Massachusetts Supreme Judicial Court

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Pursuant to United States Supreme Court Rule 15, Astra opposes Bildman's petition for a writ of certiorari. Bildman seeks to have this Court review the Massachusetts Supreme Judicial Court's decision, published as *Astra USA, Inc. v. Bildman*, 455 Mass. 116 (2009), which affirmed the trial court's grant of summary judgment dismissing Bildman's negligent libel claims against Astra. Bildman's libel claims were based on statements made by Astra concerning its investigation into Bildman's misconduct as its CEO after *BusinessWeek* published a cover story about allegations that Bildman had sexually harassed numerous female employees.

The Massachusetts Supreme Judicial Court ("SJC") affirmed the trial court's ruling that Bildman was a limited purpose public figure at the time of Astra's statements under the standard articulated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and that he had failed to sustain his burden at summary judgment of adducing evidence sufficient to satisfy the actual malice standard imposed on such plaintiffs. Bildman did not below, and does not here, challenge the trial court's ruling that he had failed to adduce evidence of actual malice, but rather confines his appeal to the SJC's ruling that he was a limited purpose public figure.

Bildman's petition should be denied based on four separate grounds, each of which demonstrates that there is no compelling reason to justify review of this matter. *See* S. Ct. R. 10. First, Bildman's petition rests on the alleged misapplication of the properly-stated rule of law governing limited purpose public figures. *Id.* (a "petition...is rarely granted when the asserted error consists of...the misapplication of a properly stated rule of law").

Second, the SJC in fact properly applied this Court's precedent in holding that Bildman was a limited purpose public figure on the record in this case. Third, Bildman has waived his contention that the First Amendment's protections do not extend to corporations, which, in any event, is without merit. Fourth, there exist two adequate and independent state grounds under Massachusetts law that fully support the SJC's decision affirming the dismissal of Bildman's negligent libel claims.

STATEMENT OF THE CASE

On February 21, 2002, a Massachusetts jury returned a special verdict answering the Court's twenty-five (25) special questions, doing so in Astra's favor in the case of all but one. It found that Bildman, while Astra's President and CEO, had committed fraud, waste, conversion of Astra's assets and breaches of his fiduciary duty to Astra, and that he had also engaged in sexual harassment of, and improper retaliation against, Astra employees. The jury also upheld Astra's 1996 termination of Bildman for cause. It awarded Astra a total of $1,040,842 in damages.[1] *See* R5658; R6680.

Astra adopts and incorporates by reference the factual summary contained in the SJC's opinion (hereinafter "the SJC decision") at 455 Mass. 116, 119-127, 914 N.E. 2d 36, 40-45 (2009). The SJC's factual summary was based "on the evidence presented to the jury and the judge's findings on the remainder, which we supplement with uncontroverted material from the record." *Id.* at 119.[2]

Because Bildman did not challenge the jury verdict in Astra's favor on appeal, and does not here challenge any aspect of the SJC decision except that which upheld summary judgment in Astra's favor on Bildman's negligent libel claims, Astra summarizes herein only that portion of the record most germane to Bildman's petition, which is confined to one issue

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[1] The jury also found that Bildman was entitled to a stock grant in the amount of $203,691, which amount was subsequently set off against Astra's verdict. *Astra USA, Inc. v. Bildman*, 455 Mass. 116, 117-118 (2009).

[2] References to the record before the SJC are cited herein as "R___."

determined by the trial court in entering summary judgment for Astra on those claims. That issue is whether the SJC properly applied this Court's precedent on when a defamation plaintiff qualifies as a limited purpose public figure to the record before it.[3]

Astra also sets forth the factual background germane to the question of whether, even if Bildman was *not* a limited purpose public figure consistent with this Court's precedent, judgment in Astra's favor was supported in any event under two (2) adequate and independent state grounds under Massachusetts law.

As the SJC stated, Astra is incorporated in New York.[4] During the relevant period of this litigation,

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[3] In his petition, Bildman casts himself as a whistleblower and asserts that the "nexus of the conflict" between Astra and himself was his "disapproval of [Astra AB's] actions in disregard of F.D.A. rules," including asserting that Astra AB concealed from the F.D.A. "severe fetus defects in a pregnant monkey on a drug Petitioner was preparing." (Pet. Br. at 5-6). Such an allegation finds no support in the record. Indeed, any assertion that Bildman was terminated for any reason other than his own misconduct was expressly rejected by the jury in its answers to special verdict questions. *See* R5658-5664. Moreover, Bildman's unsubstantiated assertions are not related in any way to the four (4) alleged libels that are the subject of the SJC's decision or his petition before this Court.

[4] *Astra*, 455 Mass. at 119. Bildman never contended that Astra USA is a foreign corporation, which it is not. Thus, the entire premise of one of Bildman's two grounds for seeking review by this Court; namely, that the First Amendment does not protect "a *foreign* multi-national drug company" is misplaced. *See* Pet. Br. at p.i—Questions Presented And Reasons For Granting The Petition; pp. 21, 23 ("The protection of and support of *foreign* non-media companies' intervention in the U.S. legal system circumventing the U.S. rule to try cases inside the courts is bound to severely damage the U.S. trial process"); and pp. 24-25 ("the lower court's vesting in a non-media *foreign*

Astra's principal place of business was Westborough, Massachusetts.

BusinessWeek Investigates Allegations That Bildman Had Sexually Harassed Astra Employees

In December 1995, Bildman learned that a *BusinessWeek* reporter named Mark Maremont was conducting an investigation into allegations by current and former Astra employees that he and senior management at Astra had engaged in sexual harassment. Indeed, over the prior decade Bildman had received numerous complaints from Astra employees about his own conduct and that of his direct reports. Bildman had in fact authorized the payment of several hundred thousand dollars of Astra funds to settle demands or claims made by female employees who asserted that he had coerced them into unwanted sexual relations, made sexually inappropriate comments, kissed or attempted to kiss them, touched their necks and buttocks, and danced with them in a sexually provocative way. Each of the settlement agreements obtained at Bildman's direction contained confidentiality provisions. Bildman did not disclose to Astra's Board of Directors that Astra, under his management, had a sexual harassment problem. *Astra*, 455 Mass. at 120-122.

Bildman Assembles A Media "Task Force" In December 1995

Upon learning that *BusinessWeek* was conducting an investigation into sexual harassment by him and his senior managers, and knowing of his own conduct,

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corporate defamation defendant...such protection and support of *foreign* influence cannot be read into the language of the First Amendment...") (emphasis supplied).

and, *inter alia*, of the settlements he had authorized to resolve claims and demands centered on his own conduct, Bildman in December 1995 created what he termed a "task force" consisting of public relations consultants and attorneys in order "to determine *BusinessWeek*'s sources of information and to control the flow of information to *BusinessWeek* and Astra AB." *Id.* at 121; R576.

In January 1996, shortly after learning of the *BusinessWeek* investigation, Bildman authorized a new payment of $100,000 in Astra's funds to another female employee to settle her sexual harassment claims against him. *Astra*, 455 Mass. at 121.

In April 1996, Bildman Directs His Task Force To Meet With *BusinessWeek* To Influence The Emerging Story

On April 16, 1996, *BusinessWeek* wrote a letter to Astra asking to speak with Bildman about "serious allegations of sexual harassment" at Astra, including by Bildman. Bildman directed Astra's General Counsel to send a letter to *BusinessWeek* denying the allegations and offering to meet with *BusinessWeek* if it provided more details to Astra. *BusinessWeek* thereafter provided a seven-page letter to Astra AB on April 18, 1996 further detailing the allegations of sexual harassment against Bildman. *Id.* at 121-122.

Once Bildman knew that *BusinessWeek* had provided Astra's parent with detailed allegations against him, he "decided, at Maremont's request, to arrange a meeting with Maremont and *BusinessWeek* magazine at Astra USA headquarters [on April 22, 1996] ... to rebut the allegations contained in the April 18, 1996 letter." R580; *Astra*, 455 Mass. at 122-123. Bildman's task force informed him that, as a result of its

meeting with Maremont, *BusinessWeek* would not immediately publish the story. R581-582.

Bildman also attempted to influence the brewing controversy internally at Astra. "[F]rom December, 1995 through March, 1996, Bildman apparently also [had] orchestrated a campaign to direct female and minority Astra employees to write letters of support for him to Astra AB." *Astra,* 455 Mass. at 122, n.11. Bildman assured Astra AB that Astra had nothing "to be ashamed of" and had a "good record concerning sexual harassment." *Id.* at 122.

Astra Suspends Bildman And Begins Its Own Investigation

Upon receiving *BusinessWeek's* detailed letter, Astra AB sent Johansson, Astra AB's General Counsel, Goran Lerenius, and Thomas Clauss, Jr., a partner in the law firm of Winthrop, Stimson, Putnam & Roberts ("Winthrop Stimson") to Astra's headquarters to conduct an initial investigation. On April 28, 2006, Astra's Board of Directors, after having interviewed Astra employees, including Bildman, about the *BusinessWeek* allegations, voted unanimously to suspend Bildman with pay, to create a special committee to investigate allegations of sexual harassment and other improprieties and report its findings to the Board, and to retain Winthrop Stimson to conduct a full investigation. *Id.* at 123.

After Bildman's Suspension, Numerous Media Articles Are Published Concerning Bildman's Suspension And The Numerous Public Lawsuits That Had Been Filed Alleging Sexual Harassment By Bildman

On April 30, 1996, the *Boston Globe* published an article about Bildman's suspension. *Boston Globe*, "Astra Chief Suspended After Harassment Charge: Westborough Firm to Probe Employee Allegations", 1996 WLNR 2200474 (April 30, 1995). It reported that Bildman's suspension came "on the heels of recent allegations of sexual harassment at Mitsubishi" to the effect that up to 500 female Mitsubishi workers were subjected to "groping, demands for sex and sexually explicit drawings." *Id.* The *Boston Herald* and *Worcester Telegram & Gazette* also published stories on the sexual harassment allegations against Bildman on April 30, 1996. *See* 1996 WLNR 252282 and 1996 WLNR 5869843.

The next day, May 1, 1996, the *Boston Globe* published an article entitled "Suit Alleges a Wild-Party Tone At Astra" about a new lawsuit filed by a former Astra employee against the company. R875-877. It reported that this lawsuit was the sixteenth sexual discrimination and/or harassment action brought against Astra or its executives by present or former employees, and quoted a Commissioner of the Massachusetts Commission Against Discrimination as stating that this was an "unusually large number." *Id.*

Before The *BusinessWeek* Publication, Bildman Actively Communicates With The Media To Influence The Public Controversy

As of May 1, 1996, the *BusinessWeek* story had not yet been published. On May 1st, the same day as the

front page *Boston Globe* story on the most recent lawsuit against Astra, Bildman once again took affirmative steps to influence the *BusinessWeek* story before its publication. His personal counsel sent two letters to the *BusinessWeek* reporter, Mark Maremont. The first referred to a conversation between Bildman's counsel and Maremont earlier that day, in which Bildman's counsel requested the opportunity to address the allegations prior to the story's publication. R707-08. The second letter contained a "Statement of Lars Bildman" responding to the allegations contained in Maremont's letter. *See* R712-713.

The Publication Of "Abuse Of Power" Generates Media Stories To Which Bildman Responds, As Well As An EEOC Investigation

The next day, May 2, 1996, *BusinessWeek* published a cover story entitled "Abuse of Power: The Astonishing Tale of Sexual Harassment at Astra USA."[5] *BusinessWeek* reported that it had interviewed more than 70 former and current employees and found "a disturbing pattern of complaints during much of Bildman's 15-year tenure, including a dozen cases of women who claimed they were either fondled or solicited for sexual favors by Bildman or other Astra executives." *Astra*, 455 Mass. at 125.

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[5] The article itself is dated May 13, 1996, but the record shows that the issue in which the article appeared was published on May 2, 1996. R911 at ¶6; *Zortman v. Bildman*, 1999 WL 1318959, *4 (Jan. 15, 1999) (Hinkle, J.) ("On May 2, 1996, *Business Week* published as its cover story an article by Maremont entitled "Abuse of Power").

The undisputed record on summary judgment was that the cover story generated both local and international media coverage, and that during May and June, 1996 alone, over one hundred and fifty articles concerning Bildman and Astra were published throughout the world. *Id.* at 124; R1027.

In his petition, Bildman asserts that *Astra* "approved the publication of the *BusinessWeek* article after the magazine's editorial board had turned it down." Bildman then contends that the "court below left this fact unnoticed." (Pet. Br. at 6 and n.3). There is no evidentiary support for this assertion.[6]

After the *BusinessWeek* article was published on May 2, 1996, Bildman continued to actively contact and interact with the media. As the SJC found:

> The judge found that Bildman, through counsel, repeatedly contacted and used the media, including *BusinessWeek*, the *Boston Globe*, and the *Boston Herald*, to comment on the investigation, deny and rebut Astra's allegations, and influence the resolution of the investigation in the public eye. In addition, Bildman sent press releases to various media outlets, including the *New York Times*, *Wall Street Journal*, Reuters, United Press, New England Cable News, CBS News, WCVB-TV, WLVI-TV, and WHDH-TV in Boston. Bildman also entered into unsuccessful

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[6] Indeed, the record citation that Bildman provides the Court for this assertion is merely his Amended Counterclaim and Third-Party Complaint. However, even that document fails to allege that Astra in any way "approved the publication" of the *BusinessWeek* article, which was, of course, highly critical of Astra. *See* R581-582.

> negotiations with CBS News to be interviewed on its evening news program in New York and appeared in an interview on a Swedish television program.

Astra, 455 Mass. at 145, n.44; R1026-1030.

Media reports on the controversy also contained Bildman's counsel's extensive comments on it. On May 20, 1996, *BusinessWeek* published a follow-up article entitled "Aftershocks Are Rumbling Through Astra: An EEOC Sexual Harassment Probe Could Be In The Works." That article quoted Bildman's counsel as stating that "there is nothing independent about the investigation and the results have been predetermined." R725. Commenting on a lawsuit filed by former Astra employees asserting that Bildman had "covered-up" allegations of sexual abuse, Bildman's counsel was quoted in a *Boston Herald* article, entitled "Six Former Astra Workers File Sex Suit" and published on May 31, 1996, as saying "This is the most reprehensible piece of drivel I've ever seen in 17 years of practicing law.... I can't believe an attorney licensed to practice law in the Commonwealth would even file it." R727.

In a June 3, 1996 letter to the Producer of CBS Evening News, Bildman's counsel wrote: "I am looking forward to hearing from you further with respect to my request that I be given the opportunity to respond on camera to the allegations which have been made against my client." R745. In a press release dated June 4, 1996 issued through his counsel, Bildman stated: "Since the beginning of this case, I and my family have been outraged at the irresponsible allegations that have been made against me." R783. In a June 13, 1996 letter to CBS News, Bildman's counsel wrote on Bildman's behalf: "He has authorized me to

speak for him and I am requesting the opportunity to go on-camera to respond to the allegations set forth in your letter of June 12th." R797.

The Equal Employment Opportunity Commission ("EEOC") also initiated an investigation in May 1996 into the allegations of sexual harassment at Astra. R721-722, 724. In February 1998, the EEOC filed its formal complaint against Astra alleging a pattern and practice of sexual harassment of Astra employees since "at least January 1, 1993 and continuing." *Astra*, 455 Mass. at 124-125. Astra entered into a consent decree with the EEOC, which established a $9,850,000 fund to compensate victims of sexual harassment at the company. *Id.*

Astra's Internal Investigation Reveals Extensive Misconduct By Bildman Leading To His Termination For Cause

Winthrop Stimson's two-month investigation uncovered "evidence of pervasive sexual harassment of female Astra employees by Bildman and others in management," evidence that Bildman had threatened employees who spoke to investigators, destroyed and/or ordered the destruction of company documents, and "evidence of...serious financial and other improprieties."[7] *Astra*, 455 Mass. at 123-124, n.13. On June 25, 1996, Astra's Board of Directors voted to terminate Bildman's employment for cause. *Id.*

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[7] In March 1997, Bildman was indicted for various felonies relating to the conduct in question and, in January 1998, he pleaded guilty to three counts of willfully filing false federal tax returns. *Id.* at 125, n.15. Both Bildman's indictment and his subsequent guilty plea received considerable media attention. *See* R899-909.

Astra Commences The Underlying Lawsuit Against Bildman, And Bildman Counterclaims, *Inter Alia*, For "Negligent Libel"

In February 1998, Astra commenced the underlying lawsuit against Bildman for fraud, conversion, waste and breaches of his fiduciary duties. Bildman responded by suing Astra and two of its Board members, Mogren and Johansson, *inter alia*, for tortious interference with his employment agreement and for libel. Prior to trial, the judge granted Astra's summary judgment motion on all of Bildman's libel claims, applying this Court's analysis in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) to find that Bildman was a limited purpose public figure and that, quite apart from whether the statements in question were true, Bildman had not adduced the requisite evidence of actual malice to survive summary judgment.[8]

After a seven week trial, a jury found Bildman liable to Astra for fraud, conversion, waste and breach of fiduciary duty by "making affirmative misrepresentation or failing to disclose to Astra material information which he had a duty to disclose," and for "improper use of Astra funds." The jury also found that Bildman engaged in sexual harassment of Astra employees, that he retaliated against Astra employees who had exercised their rights to make complaints under Astra's sexual harassment policy and that he had violated Astra's sexual harassment policy. *Astra*, 455 Mass. at 126.

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[8] At summary judgment, the trial court found that close to ten purportedly defamatory statements were either true or non-defamatory as a matter of law. Bildman did not appeal these findings or the trial court's dismissal of his "malicious libel" or "libel per se" claims. *Astra*, 455 Mass. at 144, n.42.

The jury found that in terminating its employment agreement with Bildman for cause Astra had not breached that agreement, and that Mogren and Johansson had not interfered with Bildman's employment agreement. In answering a special question about the reasonableness of Astra's conduct, the jury found that "[a]t the time Astra terminated Mr. Bildman, [ ] Astra [had] a reasonable good faith basis for believing Mr. Bildman had engaged in conduct justifying his termination 'for cause' under the 1993 employment contract." R5662.

The jury found that Bildman was liable to Astra for fraud, conversion, corporate waste, and breaches of his fiduciary duties. *Astra*, 455 Mass. at 117-118.

The trial court reserved Astra's claim for forfeiture of the compensation paid to Bildman during the period of his disloyalty, ultimately ordered a bench trial on that issue, and found that notwithstanding the strict forfeiture law under the law of New York where Astra was incorporated, Astra was not entitled to forfeiture.

The parties each appealed certain issues to the Massachusetts Appeals Court; the SJC, *sua sponte*, took the matter for direct review.

The SJC Affirms The Trial Court's Grant Of Summary Judgment On Bildman's Negligent Libel Claim

In his appeal, Bildman did not challenge the jury verdict against him. Rather, he confined his appeal to the trial court's denial of his bid for legal fees under the employment agreement and its grant of summary judgment on his libel claims. His appeal of the summary judgment was limited to the trial

court's determination that he was a limited purpose public figure; he did not challenge the trial court's determination that he had failed to adduce the requisite evidence of actual malice.

The SJC held that Astra was entitled to forfeiture of Bildman's compensation during the period of his disloyalty, and upheld the trial court's grant of summary judgment for Astra on Bildman's defamation claims, applying the rule set forth in *Gertz* and holding that, under the circumstances of this case and based on the undisputed record, Bildman did indeed qualify as a limited purpose public figure.

ARGUMENT

I. THIS CASE DOES NOT MERIT REVIEW BECAUSE THE SJC PROPERLY STATED AND APPLIED THIS COURT'S PRECEDENT IN HOLDING THAT BILDMAN WAS A LIMITED PURPOSE PUBLIC FIGURE.

In his Petition, Bildman concedes that the SJC properly stated the legal standard under *Gertz* in determining when an individual becomes a limited purpose public figure, but contends that it then "ignored all instructions in *Gertz* and its progeny as to the existence of a public controversy and the characteristics of a limited purpose public figure." (Pet. Br. at p.9). Bildman's challenge to the application of a properly-stated rule of law to the record is precisely the type of petition that this Court's Rules indicate rarely justifies review. *See* S. Ct. R. 10.

Not only did the SJC properly state the applicable legal standard for determining whether an individual is a limited purpose public figure, the SJC's decision is entirely faithful to and consistent with the

Gertz holding that extended public figure status to those who "have brought themselves to the forefront of particular controversies in order to influence the resolution of the issues involved" and who, therefore, have "invite[d] attention and comment." *Gertz*, 418 U.S. at 345. The SJC properly applied that standard to hold that Bildman was a limited purpose public figure as of the time of the four (4) purportedly actionable statements that were made by Astra on May 3, 1996, May 13, 1996, June 26, 1996 and February 5, 1998. *See Astra*, 455 Mass. at 143, n.42 ("The judge determined as to most of [the alleged defamatory statements] that they were either true or nondefamatory as a matter of law").[9]

As the statement of the case demonstrates, by May 3, 1996, the earliest of those dates, Bildman had

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[9] As discussed *infra*, these four statements were: (1) a May 3, 1996, article in the *Wall Street Journal* in which an Astra spokesperson described Bildman as "not forthcoming" to Astra AB about the *BusinessWeek* investigation; (2) a speech Mogren gave to Astra employees on May 13, 1996, in which he stated: "[S]ome people have tried to put themselves above the rules, at the same time that they have made great efforts to cover up what has happened"; (3) a June 26, 1996 Astra news release and press release that made identical statements that Bildman "had engaged in inappropriate behavior at company functions, that he had disregarded company rules and procedures, that he had failed to keep the company apprised, that he had rented outside office space for the purpose of keeping information from the parent company, that he had used company funds for family vacations and that he had used approximately $2 million for personal expenses"; and (4) an Astra statement appearing in the February 5, 1998 *Boston Globe*, after Astra's settlement with the EEOC, that Bildman's "actions-asking people to destroy records and the like-are in our estimation an attempt to cover up and keep things from his superiors in the company." *Astra*, 455 Mass. at 143, n.42.

already engaged in extensive communications with the media in an effort to influence how they portrayed him in the emerging controversy that centered on his conduct as CEO. Indeed, five (5) months earlier, Bildman had assembled a public relations team for the purpose of influencing the publication of the emerging *BusinessWeek* story prior to its publication. Then, in April 1996, Bildman had orchestrated a meeting of his "task force" with the *BusinessWeek* reporter in order to influence the story shortly before its publication.

In addition, on May 1st, after he was suspended but the day before the *BusinessWeek* story was published, Bildman had his counsel speak with the *BusinessWeek* reporter to see if he could affect its content, and then faxed the reporter a "Statement of Lars Bildman." On that day, Bildman was *already* the subject of *Boston Globe* and *Boston Herald* stories relating to sexual harassment allegations against him by former Astra employees. By the next day, May 2, 1996, Bildman was also the subject of a *BusinessWeek* cover story, which, in turn, generated some one hundred and fifty additional stories about Bildman and Astra around the world. There is no evidence in the record that Astra was responsible for these stories.

Bildman's sexual harassment of employees at Astra was indeed a public controversy. As an initial matter and as reflected in the *BusinessWeek* article itself, the revelation of Bildman's conduct at Astra came several months after the revelation of another high-profile corporate sexual harassment scandal, which had generated a governmental investigation by the EEOC:

> The Astra example comes on the heels of the sexual harassment scandal at the Norman (Ill.) factory of Mitsubishi.... The [EEOC], which brought its largest suit of this kind against the company, alleges that Mitsubishi did not respond to the repeated complaints.... While Mitsubishi and Astra are extraordinary for the breadth and depth of their problems, many companies are struggling with sexual harassment claims.

R919.

As recognized by the SJC, "the issue of sexual harassment in the workplace is a focus of a considerable body of State and Federal law and regulation and a matter of frequent and often heated public debate." *Astra*, 455 Mass. at 145-146. Such was certainly the case when it came to Bildman's misconduct at Astra:

> The topic of Bildman's actions echoed far beyond Astra, its employees, and their families. For many months, it wove its way into the national and international discourse about permissible conduct in the workplace and the place and treatment of women in the private sector.

Id.

Not only was sexual harassment at Astra a public controversy by May 1996, but it was Bildman's conduct which *was* the controversy, as the trial court properly found based on the undisputed summary judgment record. R1233-1235—Summary Judgment Decision at 45-47 ("Bildman was at the center of a federal sexual harassment investigation of a publicly traded pharmaceutical company employing over 1,000 people in Westborough, Massachusetts"). *See Gray v. St. Martin's Press, Inc.*, 221 F.3d 243, 251 (1st Cir. 2000) (holding

that plaintiff was "central figure" in the public controversy concerning the influence of lobbyists and had been the subject of articles by *Time Magazine* and *Newsweek*).

Bildman was not only the central figure in the public controversy concerning *his* sexual harassment of employees at Astra, he voluntarily and affirmatively sought first to influence the *BusinessWeek* story *before* it was published, and then to influence the public's view of the public controversy centering on his conduct that was generated by the *BusinessWeek* story and the immediate print and electronic media stories about lawsuits and other allegations of his misconduct. Based on Bildman's press releases and public statements, and his counsel's repeated communications with news outlets denouncing those who had made these allegations, the trial court found "on the undisputed record, that Bildman was neither a victim nor an unwitting participant in the broad media coverage of his dispute with Astra." *Astra*, 455 Mass. at 145.

The SJC agreed:

> His is not a case in which the libel plaintiff is a "bit player" in a media drama created by forces over which he had no control. Bildman played a central role, with "access to the channels of effective communication" that most private individuals do not enjoy.... *It is readily apparent to us, as it was to the judge, that Bildman "palpably engineered efforts to project himself into the public limelight."*

Astra, 455 Mass. at 145-146 (quoting *Gertz*, 418 U.S. at 344 and *Tripoli v. Boston Herald-Traveler Corp.*, 359 Mass. 150, 156 (1971) (emphasis added)).

Bildman's assertion that the SJC's decision is at odds with this Court's precedent since *Gertz* is incorrect. He relies on three cases in support of his argument, each sharply different from the record in *this* case.

In *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), the defamation plaintiff was a private litigant whose divorce proceeding was covered by the media by virtue of her social status and the evidence of adultery by the parties. Indeed, there was no "public controversy." As this Court recognized, "[d]issolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public." *Id.* at 545. Nor was there the requisite evidence that the plaintiff had thrust herself to the forefront of any controversy beyond the litigation between herself and her husband. *Id.* (wife did not "choose to publicize issues on the propriety of her married life. She was compelled to go to court...to obtain legal release from the bonds of matrimony"). As a result, the plaintiff was a private figure for purposes of her libel claims.

Similarly, in *Wolston v. Readers Digest Association*, 443 U.S. 157 (1979), the defamation plaintiff had failed to respond to a grand jury subpoena in connection with the government's investigation into Soviet espionage in 1958. Then, close to twenty years later, the defendants published a book contending that the plaintiff was a Soviet agent in the United States and had been indicted for espionage. In reversing the lower court's ruling that plaintiff was a limited purpose public figure in 1958, the Court recognized that the plaintiff had "not in any way [sought] to

arouse public sentiment in his favor and against the [government] investigation." *Id.* at 168.

Although the plaintiff's failure to respond to the grand jury subpoena caused significant media attention in 1958, the Court focused on the plaintiff's *role* in the public controversy and his interaction with the media.

> We emphasize that a court must focus on the "*nature and extent of an individual's participation in the particular controversy giving rise to the defamation.*"... Similarly, *petitioner never discussed this matter with the press*, and limited his involvement to that necessary to defend himself against the contempt charge. It is clear that petitioner *played only a minor role* in whatever controversy there may have been concerning the investigation of Soviet espionage.

Id. at 167 (emphasis added) (quoting *Gertz*, 418 U.S. at 352)). Because the plaintiff was the passive recipient of media attention, and did nothing to seek to shape or influence it, and his conduct was limited to his failure to appear in response to a grand jury subpoena, this Court held that he was not a limited purpose public figure.

In the third case relied upon by Bildman, *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), the defendant's argument that the plaintiff qualified for limited purpose figure status rested principally on the fact that plaintiff, a scientist, had: (1) successfully applied for and received federal grants and (2) responded publicly to the defendant United States Senator's public announcement of the "Golden Fleece" award that chastised federal agencies for funding the plaintiff's research. This Court rejected

the defendant's argument because it found that the plaintiff's research only became a matter of public controversy *because of* the defendant's conduct and plaintiff did not "thrust himself or his views into the public controversy to influence others." *Id.* at 112-113 ("Those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure").

Bildman's role in the public controversy and his attempt to influence it stands in stark contrast to the passive behavior of the defamation plaintiffs in *Firestone*, *Wolston*, and *Proxmire*. First, as the SJC stated, Bildman was not a "bit player" in the public controversy concerning the allegations of sexual harassment at Astra in 1996. Rather, he *was* the public controversy, playing a "central role" in creating, trying to suppress, and then attempting to influence the coverage of a sexual harassment scandal whose wide-ranging impact is best reflected by the international attention that it generated. *Astra*, 455 Mass. at 145-146 and n.45 ("We add that the media storm that swept over Bildman originated in *his own wrongful conduct* as a corporate officer and director beginning years before *BusinessWeek* began its investigation") (emphasis added).

Second, unlike the plaintiffs in *Firestone* and *Wolston*, Bildman actively sought out the media, directly and through his counsel, *before* Astra published any of the four statements that he asserts were actionable, in an effort to shape the media's reporting of his alleged sexual harassment of female employees. Indeed, Bildman had: (1) established a public relations task force in December 1995 in an effort to thwart, or shape, the *BusinessWeek* investigation; (2) directed his task force to meet with

BusinessWeek in April 1996 in an effort to persuade the magazine not to publish its exposé; (3) *after* his suspension, but before the *BusinessWeek* article's publication, directed his counsel to communicate, on his behalf, with *BusinessWeek* and to provide the "Statement of Lars Bildman"; and (4) after the *BusinessWeek* article's publication on May 2, 1996, continued to actively and repeatedly communicate with the numerous media outlets. *See Astra*, 455 Mass. at 146 ("It is readily apparent to us, as it was to the judge, that Bildman 'palpably engineered efforts to project himself into the public limelight'").

Third, unlike in *Firestone* and *Proxmire*, in which the defendants dragged the plaintiffs into the media spotlight, Astra had nothing to do with *BusinessWeek's* publication of "Abuse of Power" or of the subsequent news stories published in the *Boston Globe* and other newspapers in the spring and summer of 1996 concerning the various sexual harassment lawsuits that had been filed against Bildman.

Put simply, by the time Astra made the four statements which are the subject of this petition, Bildman had not only generated a public controversy concerning *his own conduct*, but had actively ensured that he stayed at the forefront of that controversy by attempting to use the media to influence the public's perception of him and his role in the controversy. *See Astra*, 455 Mass. at 145-146 ("Bildman played a central role, with 'access to the channels of effective communication' that most private individuals do not enjoy") (quoting *Gertz*, 418 U.S. at 344). The SJC properly held that Bildman was a limited purpose public figure for purposes of his negligent libel claims against Astra.

II. THIS CASE DOES NOT MERIT REVIEW BECAUSE BILDMAN'S CONTENTION THAT THE FIRST AMENDMENT DOES NOT PROTECT ASTRA (1) HAS BEEN WAIVED AND (2) IS ERRONEOUS.

In his petition, Bildman asserts for the first time in over twelve years of litigation that "the First Amendment does not invest in foreign multinational corporations the same immunities as it guarantees a media defendant against liability in defamation actions." (Pet. Br. at 21-22).

As a threshold matter, it is worth noting that the trial court dismissed Bildman's claims against Astra AB (a foreign multinational corporation) well before summary judgment and Bildman withdrew his appeal of all rulings in favor of Astra AB. Moreover, Bildman's libel claims at the summary judgment stage were against Astra USA, Inc., which is a *New York* corporation. As a result, Bildman had no libel claims against a "foreign multinational drug company" in the trial court, and his appeal before the SJC similarly did not involve Astra AB.

In any event, Bildman never asserted that Astra was unprotected by the First Amendment either before the trial court or the SJC. As a result, Bildman has waived this issue. *See Plucket v. United States*,—U.S.—, 129 S.Ct. 1423, 1428 (2009) ("No procedural principle is more familiar to this Court than a right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it"); *Lazzara v. Wyle Electronics Co.*, 56 Mass. App. Ct. 1112, 2002 WL 3169483, at *4 and n.13 (Mass. App. Ct. 2002) ("We do not consider arguments or

issues not advanced below in opposition to summary judgment, but raised for the first time on appeal").

Moreover, this Court ruled less than two months ago that the "Government may not suppress political speech on the basis of the speaker's corporate identity." *Citizens United v. Federal Election Commission*,— U.S.—, 130 S.Ct. 876, 913 (2010). The Court made it clear that it has long recognized that "First Amendment protection extends to corporations." *Id.* at 889-900 (citing approximately twenty cases).

> We thus find no support in the First Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation. . . .

Id. at 902 (quoting *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 784-785 (1978)).

Further, Bildman's attempt to draw a Constitutional distinction between corporations and "media defendants" in terms of the scope and protection afforded by the First Amendment has similarly been rejected by this Court.

> There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not. We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.

Id. at 905. Bildman fails to offer any contrary legal authority. Bildman's argument does not merit review by this Court.

III. THIS CASE DOES NOT MERIT REVIEW BECAUSE THERE ARE TWO ADEQUATE AND INDEPENDENT STATE GROUNDS UNDER MASSACHUSETTS LAW FOR THE SJC'S REJECTION OF BILDMAN'S NEGLIGENT LIBEL CLAIMS.

This Court has tended to deny petitions seeking review of state court decisions where adequate and independent state grounds exist supporting those decisions. E. Gressman, K. Geller, S. Shapiro, T. Bishop, E. Hartnett, *Supreme Court Practice* at 4.25 (9th ed. 2007); Justice Brennan, *State Court Decisions and the Supreme Court*, 31 Penn. Bar. Assn. Q. 393, 399-400 (1960) (where substantial questions are presented and were properly raised in state court, "even then we may not take the case if the state court's judgment can be sustained on an independent ground of state law").

While this Court presumptively has jurisdiction to review the SJC's decision under the standard articulated in *Michigan v. Long*, 463 U.S. 1032 (1983), it should decline the petition for certiorari since adequate and independent state grounds exist that support the SJC's decision on Petitioner's libel claims.[10] As this Court explained over sixty-five years ago:

> [O]ur power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment

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[10] In *Long*, the Court held that it will presume that it has jurisdiction to review a state court decision when the decision "fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Long*, 463 U.S. at 1040-1041.

> would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945). As Justice Stevens recently stated: "[e]ven if the state court opinion does not include the magic words set forth in *Long*, or some similarly explicit sentence, we lack jurisdiction if it is nonetheless apparent that the decision is indeed supported by an adequate and independent state ground." *Florida v. Powell*,—U.S.—, 130 S.Ct. 1195 (2010) (Stevens, J. dissenting).[11]

Here, and as Astra argued to the SJC, the jury's verdict, as reflected by its answers to special questions, supported the SJC's decision upholding dismissal of Bildman's negligent libel claims on two state law grounds entirely independent of whether Bildman qualified as a limited purpose public figure based on this Court's precedent and the record.[12]

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[11] Indeed, even where the Court accepts a petition for review of a state court decision, its "practice is to avoid reaching constitutional questions if a dispositive non-constitutional ground is available." *Proxmire*, 443 U.S. at 122; *Wolston*, 443 U.S. at 160, n.2 ("[T]he general principle [is] that dispositive issues of statutory and local law are to be treated before reaching constitutional issues").

[12] *See* Astra's Reply Brief at pp. 10-13. The SJC had no need to reach these arguments, however, since it upheld the trial court's ruling that Bildman was a limited purpose public figure for purposes of the allegedly defamatory statements. Where Bildman did not appeal from the trial court's ruling that he had not adduced the requisite evidence of actual malice to survive summary judgment under the *New York Times* standard, the Court's ruling that Bildman was indeed a limited purpose public figure alone dictated that the trial court's decision granting

First, where the jury expressly found that Astra (1) had not breached the employment agreement in terminating Bildman for cause and (2) had undertaken its investigation reasonably and in good faith such that Astra had "a reasonable good faith basis for believing that Mr. Bildman had engaged in wrongful conduct justifying his termination 'for cause' under the 1993 employment contract," Astra had an independent conditional privilege under Massachusetts law to comment about its investigation of its CEO and his conduct because it was reasonably necessary to do so in order to protect its legitimate interests. *See Bratt v. International Business Machines Corp.*, 392 Mass. 508, 512-513 (1984) ("a person may possess a conditional privilege to publish defamatory material if the publication is reasonably necessary to the protection or furtherance of a legitimate business interest").

Under Massachusetts law, this conditional privilege imposed the same burden on Bildman to adduce trial-worthy evidence of actual malice as he was required to adduce as a limited purpose public figure. *Id.* at 515-516. Accordingly, judgment was warranted for Astra on the entirely independent state-law basis of its conditional privilege, coupled with Bildman's inability to adduce evidence of actual malice on Astra's part.

Second, the specific jury findings that Bildman defrauded Astra, converted and wasted its assets, falsely misrepresented facts to it and/or withheld material facts from it, breached his fiduciary duties to it by misappropriating its funds, sexually harassed

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summary judgment to Astra on Bildman's negligent libel claims be upheld.

Astra employees, retaliated against Astra employees and violated Astra's sexual harassment policy established that the allegedly defamatory statements that underlie this appeal were "substantially true," at the very minimum. Therefore, whether or not Bildman qualified as a limited purpose public figure on the basis of the applicable precedent and the record, the jury verdict has effectively established that Astra's statements were true and could not support a defamation claim even if this Court were to disagree with the conclusion that Bildman were a limited purpose public figure on the record in this case.

A. The Jury's Answers To Special Questions Established Astra's Conditional Privilege To Comment On Its Investigation Into Its Former CEO's Misconduct, And Imposed An Independent Burden On Bildman To Adduce The Requisite Evidence Of Actual Malice.

Under Massachusetts law, an employer has a conditional privilege to comment on its reasons for terminating an employee as long as its communications are made principally for the purpose of furthering its legitimate interests. The conditional privilege protects an employer from liability unless the employee can establish that it acted with actual malice or acted recklessly by unnecessary, unreasonable or excessive publication of the allegedly defamatory material. *See, e.g., Bratt*, 392 Mass. at 512-516; *Broomes v. Blue Cross Blue Shield of Massachusetts, Inc.*, 74 Mass. App. Ct. 1123, 2009 WL 1953006, *9 (Mass. App. Ct. July 9, 2009) (affirming summary judgment on defamation claims; "the employee bears the burden of demonstrating that the employer has lost the privilege"); *Kyle v. Mongan*,

72 Mass. App. Ct. 1111, 2008 WL 2951800, *2-3 (Mass. App. Ct. August 4, 2008) (affirming summary judgment dismissing defamation claim because the defendant president of a hospital under public scrutiny for terminating employee "had a conditional privilege to publish defamatory material about Kyle in order to protect MGH's legitimate business interests"); *Sklar v. Beth Israel Deaconess Medical Center*, 59 Mass. App. Ct. 550, 558 (2003) (affirming grant of summary judgment because supervisor's publication of information about employee's possible ethical violations was conditionally privileged); *Dragonas v. School Committee of Melrose*, 64 Mass. App. Ct. 429, 438-439 (2005) (conditional privilege is lost "only if publication is not made chiefly for the purposes of furthering the [business] interest").

Astra moved for summary judgment on Bildman's negligent libel claims not only on the basis of Bildman's status as a limited purpose public figure, but on the alternative ground that it was conditionally privileged to comment on Bildman's suspension and termination in order to protect its legitimate business interests in the context of the extraordinary public controversy surrounding the allegations of sexual harassment by Astra management and the highly-publicized EEOC investigation into the company that ensued. *See* R1242-1243. In opposing Astra's motion for summary judgment, Bildman did not assert that Astra's statements were published "excessively." Rather, he argued that Astra had published the statements based on an improper motive and with ill will.

While the trial court agreed that Bildman was a limited purpose public figure and granted summary judgment on that basis, it found that, because Bildman contended that Astra's investigation was a

wrongful one, Astra's entitlement to the conditional privilege was a matter of dispute, and therefore not one that could be determined as a matter of law. R1244-1247.

However, the subsequent jury verdict in Astra's favor and in favor of the two Astra executives who Bildman contended had tortiously interfered with his employment agreement, and the jury's answers to the special questions posed to it, have conclusively resolved that dispute in Astra's favor. They establish that Astra was indeed conditionally privileged to comment on the discipline of its CEO. *See* R5658-5664.

Specifically, the jury found that Astra's investigation into Bildman's conduct leading to his termination for cause produced substantial evidence that he had misappropriated corporate funds for personal purposes, engaged in inappropriate conduct toward employees and been dishonest with Astra's Board of Directors. The jury expressly found that Bildman had, indeed, defrauded Astra, wrongfully converted and misappropriated its funds, engaged in sexual harassment of Astra employees and retaliated against them, and made false representations of fact or failed to disclose material facts to Astra's Board. And, unsurprisingly given its findings that Bildman had *actually* engaged, *inter alia*, in fraud, misappropriation of corporate funds, misleading conduct and sexual harassment, the jury also expressly found that "[a]t the time Astra terminated Mr. Bildman, Astra [had] *a reasonable good faith basis* for believing Mr. Bildman had engaged in conduct justifying his termination 'for cause'" under his employment agreement. *See* R5662 at Q.19 (emphasis added).

Similarly, the jury expressly found that Mogren and Johansson had *not* tortiously interfered with Bildman's employment agreement, effectively constituting a finding that they did not act in bad faith or out of an improper motive. *See* R5663; *Brewster Wallcovering Co. v. Blue Mountain Wallcoverings, Inc.*, 68 Mass. App. Ct. 582, 608 (2007) (reversing verdict on tortious interference claim; "the 'improper motive or means' element requires proof of actual malice, i.e. 'a spiteful, malignant purpose, unrelated to the legitimate corporate interest'").

In short, the jury verdict answered the very dispositive question that the trial court found was unanswerable at the summary judgment stage on the applicability of the conditional privilege under Massachusetts law: Astra's actions were fair, in good faith and not based on improper motive. Accordingly, Astra was conditionally privileged to comment on its investigation of and disciplinary actions against its former CEO. Bildman did not and does not challenge the trial court's finding that, assuming that Astra had stated anything about him that was actually untrue, he had failed to adduce evidence at the summary judgment stage that Astra had acted in reckless disregard of the statement's untruth.

B. The Jury Verdict And Its Answers To Special Questions Also Established The Substantial Truth Of Astra's Purportedly Actionable Statements.

The SJC's judgment would be proper on yet another independent state ground, even if Bildman was not a limited purpose public figure, for the most fundamental reason of all. Astra's purportedly actionable statements were *true or substantially true*, as established by the jury's verdict in Astra's favor.

See Mason v. New Yorker Magazine, Inc., 501 U.S. 496, 516-517 (1991) (Law of libel "concentrates upon substantial truth.... Minor inaccuracies do not amount to falsity so long as the substance, the gift, the sting, of the libelous charge be justified"); *Reilly v. Associated Press*, 59 Mass. App. Ct. 764, 770-771 (2003) (Statements "were essentially true, albeit with minor inaccuracies, and so were not defamatory").

A comparison of the statements that formed the basis of Bildman's appeal first to the SJC and now to this Court, on the one hand, with the jury's express findings, on the other, demonstrates that the jury has adjudicated the truth or substantial truth of each of these statements—all in Astra's favor. The SJC summarized Bildman's negligent defamation claim as follows:

> On appeal, Bildman's negligent libel claim focuses on the following statements: (a) a May 3, 1996, article in the *Wall Street Journal* in which an Astra spokesperson described Bildman as "not forthcoming" to Astra AB about the *Business-Week* investigation;
>
> (b) a speech Mogren gave to Astra employees on May 13, 1996, in which he stated, among other things: "[S]ome people have tried to put themselves above the rules, at the same time that they have made great efforts to cover up what has happened";
>
> (c) a June 26, 1996, Astra news release and press release that made identical statements that, as Bildman summarized on appeal, he "had engaged in inappropriate behavior at company functions, that he had disregarded company rules and procedures, that he had failed to keep the company apprised, that he had rented outside office space

> for the purpose of keeping information from the parent company, that he had used company funds for family vacations and that he had used approximately $2 million for personal expenses"; and
>
> (d) an Astra statement appearing in the February 5, 1998, *Boston Globe* that Bildman's "actions—asking people to destroy records and the like—are in our estimation an attempt to cover up and keep things from his superiors in the company."

Astra, 455 Mass. at 143, n.42.

The jury's verdict that Bildman had defrauded Astra, misappropriated its funds and made material misrepresentations or withheld material facts from its Board conclusively establishes the truth of statements (a) and (b).

Its express findings that Bildman had sexually harassed and retaliated against Astra employees, had violated Astra's sexual harassment policies, had defrauded Astra out of $1,042,000 and had converted that amount for personal use, confirmed at a minimum the "substance" of statements (b) and (c).

As for statement (d), as the SJC pointed out:

> The jury also heard evidence that at Bildman's direction and without the knowledge of Astra's Board, Magnusson [an individual hired by Bildman] set up a five-employee satellite office from which he shredded corporate documents; that he and Bildman removed Astra documents, including financial documents from Bildman's office; and that after receiving a telephone call from Bildman, Magnusson had company computers 'erased'.

Id. at 123.

Although the jury was not asked to answer a specific question on the precise issue of whether Bildman had "ask[ed] people to destroy records," the jury *was* asked to make an express finding of whether or not he had misrepresented material facts to, and/or had withheld material facts from, Astra's Board of Directors, which clearly encompasses the "substance" or the "gist" of the alleged defamatory statement, namely, that Bildman had engaged "in our estimation [in] an attempt to cover up and keep things form his superiors in the company." This statement was not merely supported by extensive evidence, but also established by the jury's express findings.

Bildman has not challenged *any* of the jury's express findings or, indeed, any other aspect of the verdict. In short, the unchallenged jury verdict established the truth or, at a minimum, the substantial truth of every one of the purportedly actionable statements. Therefore, the SJC's judgment is correct for this additional reason.

Given the independent state-law grounds that support the SJC's rejection of Bildman's negligent libel claims, the Court should decline review of this case. *See Proxmire*, 443 U.S. at 122 ("Our practice is to avoid reaching constitutional questions if a dispositive nonconstitutional ground is available.... If the District Court correctly decided the state law question, resolution of the First Amendment issue would be unnecessary").

CONCLUSION

For the foregoing reasons, Respondent Astra USA, Inc. respectfully requests that this Court deny the petition for certiorari.

Respectfully submitted,

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April 2, 2010

APPENDIX

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APPENDIX A

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, ss.

SUPERIOR COURT CIVIL ACTIONS
No. 98-0580-C
No. 99-1942-G

ASTRA USA, INC.,
Plaintiff,

vs.

LARS BILDMAN,
Defendant,

vs.

HÅKAN MOGREN & another[1],
Third-Party Defendants

LARS BILDMAN,
Plaintiff,

vs.

HÅKAN MOGREN. & another[2],
Defendants

---

[1] Carl-Gustaf Johansson.

[2] Carl-Gustaf Johansson.

MEMORANDUM OF DECISION AND ORDER ON PARTIES' MOTIONS FOR SUMMARY JUDGMENT

This case arises out of the 1996 termination by Astra USA, Inc. of Lars Bildman as its President and Chief Executive Officer. Cross motions for summary judgment are before the court.

BACKGROUND

The undisputed facts and the disputed facts viewed in the light most favorable to the nonmoving party, as revealed by the summary judgment record, are as follows. Swedish company Astra AB, together with its 50 subsidiaries in approximately 40 countries ("the Astra Group"), is engaged in a worldwide pharmaceutical business employing over 20,000 people. Astra U.S.A. is a New York corporation which until 1999 was a wholly-owned subsidiary of Astra AB and operated through its own Board of Directors. In 1981, Lars P.E. Bildman ("Bildman") became Astra U.S.A.'s President, Chief Executive Officer and a member of its Board of Directors. Håkan Mogren ("Mogren") joined the Astra Group in 1988 when he became President and Chief Executive Officer of Astra AB. In addition, Mogren served as a director of Astra U.S.A. beginning in 1988. Carl-Gustaf Johansson ("Johansson") joined the Astra Group in 1963 and in 1995 was elected to the Astra U.S.A Board of Directors and became Astra's Regional Director for North America.

Initially, Bildman's employment with Astra U.S.A. was as an Astra AB expatriate, under an agreement dated April 30, 1981. This expatriate agreement provided for the payment of specifically enumerated expenses related to employment abroad. According to Bildman, the expatriate employment agreement did not set forth all the terms he had negotiated

with Astra AB's CEO and President at the time, Ulf Widengren ("Widengren"). (7/30/01 Bildman Aff. ¶ 2)[3] Between 1981 and 1993, the terms of the expatriate employment agreement changed many times, based on negotiations between Bildman and the President and CEO of Astra AB; however, these changes were not memorialized.

When Bildman moved to Astra U.S.A. as an expatriate, Widegren and Astra AB's CFO, Peter Sjostrand ("Sjostrand"), authorized payment by Astra U.S.A. of routine legal services for Bildman's benefit. (Tully Dep., pp. 25-26). The expatriate employment agreement itself is silent as to legal services. Bildman believed that as an expatriate he was entitled to have Astra U.S.A. pay for his personal legal services, and he charged personal legal fees involving real estate, disputes with a neighbor and traffic violations to Astra U.S.A. As a Swedish citizen, Bildman was concerned that a traffic violation in the United States would cause him to lose his driver's license. Jan B.A. Janson, the President of Astra Japan, lost his license due to a traffic violation and Astra had to pay for a chauffeur to drive him around while his license was suspended. Bildman therefore believed it was an appropriate business expense and in accordance with the terms of his expatriate employment agreement to have Astra U.S.A. pay for his personal legal fees in connection with a speeding ticket he received. Bildman never obtained the authorization of Astra U.S.A.'s Board of Directors for these personal legal expenses.

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[3] In addition, according to Bildman, the agreement produced by Astra in this litigation is incomplete and is missing a page after the signature page which dealt with Bildman's compensation. (7/30/01 Bildman Aff. ¶ 2).

In 1976, Bildman was provided with a copy of the Astra Group General Conditions for Foreign Service ("General Conditions") which applied to expatriate employees. The General Conditions provided that remuneration and benefits specified in the employee's written contract "shall be the total compensation to which the Employee is entitled." The General Conditions further provided that the employee could receive a housing allowance if jointly approved in advance by the receiving company and Human Resources, but that "[i]f the Employee purchases a house or other accommodation in the Country of Service, all costs and/or losses in connection with the buying and selling thereof will be the responsibility of the Employee" Bildman never asked Astra AB to pay for the purchase of his home or for any renovations or improvements to his home when he was employed as an expatriate.

According to Bildman, the General Conditions applied only to mid or lower level employees and did not apply to him or other Presidents of Astra AB subsidiaries. When he received the revised version of the General Conditions from Gunnar Christiani ("Christiani") in 1991, Bildman informed Christiani and Sjostrand, then Astra's Regional Director of North America, that the General Conditions did not apply to him as President and CEO of Astra U.S.A. Sjostrand confirmed that the General Conditions did not apply to Bildman. Bildman refused to sign the General Conditions.

Around 1992, Johansson, who was then responsible for Astra AB's subsidiaries in Southern Europe, advocated that Astra AB transfer its right to market Pulmicort Turbuhaler in the United States to Schering-Plough in return for Schering-Plough

transferring its rights to sell the Pulmicort Turbuhaler in Italy, France and Spain to the Astra AB subsidiaries there. (Solvell Dep. Vol V, pp. 692-693). Bildman was strenuously opposed to this proposal. (Solvell Dep. Vol. V, pp. 694). At a meeting in Boston, Johansson and Bildman were in such strong disagreement that they were screaming at each other and almost came to blows. (Solvell Dep. Vol. V, pp. 693-697; Testen Aff. ¶ 10). In the end, Astra retained the marketing rights to Pulmicort Turbuhaler, and Johansson's proposal was not adopted. (Solvell Dep. Vol. V, p. 694).

In September of 1992, Bildman approved an Astra U.S.A. Administrative Expense Report completed by Stefan Solvell ("Solvell") which, in addition to 21 other entries, contained a $500 contribution to the Hatch Election Committee. In approving expense reports, Bildman did not read the reports or assess each individual item included; he merely signed them. Bildman did not seek any legal advice as to whether reimbursement of campaign contributions was legal before authorizing the report, nor did he disclose his authorization of such reimbursement to the Board of Directors.

On June 15, 1993, Bildman entered into a direct employment agreement with Astra U.S.A. ("the Employment Agreement"). Mogren signed the Employment Agreement in his capacity as an authorized representative of the Astra U.S.A. Board of Directors' Compensation Committee. According to Bildman, although Mogren signed a portion of the agreement, he did not sign a portion relating to financial compensation. Bildman repeatedly requested that Mogren provide him with a signed copy, but Mogren never did.

The Employment Agreement states that it is effective July 1, 1993 and shall remain in full force and effect indefinitely until terminated in accordance with the provisions of Paragraph 4. The Agreement further states that "all prior agreements and understandings governing the Employee's employment shall be deemed to have terminated and be of no further effect, whether such agreements and understandings were between the Employee and the Company or between the Employee and any parent, subsidiary or affiliated corporation or entity of the Company." Under Paragraph 2 of the Employment Agreement, Bildman agreed:

> to assume such duties and responsibilities as are commensurate with the customary duties of President and Chief Executive Officer and a member of the Company's Board of Directors, and as may be assigned to the Employee by the Company's Board of Directors or by the by-laws of the Company from time to time, subject to the supervision, direction and control of the Company's Board of Directors, to whom the Employee shall be responsible.

(Ex. 1 to Mogren Aff. ¶ 2(a)).

Paragraph 3 of the Employment Agreement sets forth Bildman's base salary and provides for annual bonus compensation to be paid in accordance with the formula set forth in the Company's annual incentive bonus plan. Paragraph 3 also provides that Astra "shall reimburse the Employee for all reasonable travel, entertainment, and other business expenses incurred by him in the performance of his duties and responsibilities, subject to such reasonable requirements with respect to substantiation and docu-

mentation as may be specified by the Company or its auditors."

Paragraph 4 of the Employment Agreement sets forth the various ways in which either party can terminate the Agreement Paragraph 4(f) provides in relevant part:

> The Employee's employment hereunder may be terminated for cause by the Company, effective immediately, by a vote of a majority of all of the members of the Board of Directors, on written notice to the Employee setting forth in reasonable detail the nature of such cause. For purposes of this Agreement, "cause" means only: (i) the willful commission by the Employee of theft; embezzlement, fraud or other serious and substantial crimes against the Company, or (ii) other acts or omissions materially evidencing bad faith toward the Company, or (iii) conviction of the Employee of any criminal offense involving dishonesty or breach of trust or any felony.

The Agreement further provides that "[i]n the event of the termination of the Employee under this Paragraph, the Company shall have no further obligation to the Employee hereunder, except any obligation under any compensation or benefit plan in which the Employee is then a participant" (Ex. 1 to Mogren Aff. ¶ 4(f)).

Paragraph 8 of the Employment Agreement provides:

> The Company agrees to indemnify the Employee in his capacity as an officer and member of the Board of Directors of the Company, all to the maximum extent permitted under the laws of the Commonwealth of Massachusetts, from and against any and all claims, damages, suits, costs,

or liabilities, arising out of or relating to the performance of his duties and responsibilities as President and Chief Executive officer. The provisions of this Paragraph 8 shall survive expiration or termination of this Agreement for any reason.

Paragraph 9 provides:

> The Company shall pay to the Employee all reasonable legal fees and expenses incurred by him in contesting or disputing any termination of this Agreement or in seeking to obtain or enforce any right or benefit provided by this Agreement. In no event shall the Employee be required to reimburse the Company for any legal fees or expenses incurred by it in connection with this Agreement.

The Employment Agreement states that it constitutes the entire agreement between the parties with respect to its subject matter and can only be amended or modified by a writing executed by the employee and an authorized representative of the company. (Ex. 1 to Mogren Aff. ¶¶ 11, 13). The Agreement also states that it shall be construed and enforced in all respects in accordance with Massachusetts law. (Ex. 1 to Mogren Aff. ¶ 15).

According to Bildman, the Employment Agreement did not contain all the terms of his employment. (7/30/01 Bildman Aff. ¶ 7). Bildman claims that during negotiations, Mogren agreed to a three year written severance period, but at the time of execution, Mogren told Badman that he could not give more than two years severance in writing because of the Swedish political climate. (7/30/01 Bildman Aff. ¶ 7). Upon signing the agreement, Mogren orally agreed to give Bildman a third year of severance, and the two men had a separate handshake agreement to that

effect in front of Clauss Wilhelmson ("Wilhelmson"), who was then Astra AB's Regional Director for North America. (7/30/01 Bildman Aff. ¶ 7). In addition, although the Employment Agreement provided that the Astra U.S.A. Directors would determine Bildman's compensation, Mogren told Bildman that he and Wilhelmson would determine Bildman's compensation, which they did. (7/30/01 Bildman Aff. ¶ 8). Similarly, although the agreement provided that Bildman would serve subject to the supervision, direction and control of Astra U.S.A.'s Board, Mogren told Bildman that he would be subject to the supervision, direction and control of Astra AB. During Bildman's tenure as President of Astra U.S.A., he was subject to direct supervision and control by Mogren and Astra AB, through Johansson and other Astra AB executives. (7/30/01 Bildman Aff. ¶ 6).

Astra U.S.A.'s Travel and Expense Policy and Guidelines, dated October 1, 1994, state that it is "Astra's policy to reimburse employees for actual expenses that are reasonable and necessary for carrying out the Company's business." Personal meals in non-travel status and personal entertainment are specifically listed as non-reimbursable expenses. The Travel and Expense Policy provides:

> Reasonable entertainment expenses are reimbursable, and the expenditure should be incurred on a common sense basis. These expenses are reimbursable only if they are directly related to the active conduct of the company's business when directly preceding or following a business discussion, or are necessary to accomplish some useful purpose connected with the company's business.

- To qualify as a business expenditure, entertainment expenses cannot be lavish or extravagant and must be "directly related to" or "associated with" the company's business.
- Entertainment expenses must meet the "directly related test" below:

  1. The company must expect to derive income or some other specific business benefit other than good will at some future time.
  2. The employee/company must engage in active conduct of the business during the entertainment with the persons being entertained.
  3. The active conduct of business must be the primary aspect of the combined business and entertainment activity.

(Ex. 2 to Yon Dep. p. 16).

According to Bildman, Astra U.S.A.'s Travel and Expense Policy did not apply to him. As President of Astra U.S.A., Bildman retained the authority to incur travel and entertainment expenses within his sole discretion, provided that such expenses were within the budget and Bildman believed they would promote some business purpose. (7/30/01 Bildman Aff. ¶ 9; Sjostrand Aff. ¶¶ 6-8; Broere Aff. ¶ 9). Further, entertaining visiting Astra AB executives with adult entertainment was encouraged, not prohibited. (7/30/01 Bildman Aft ¶ 9).

Bildman authorized payment of several months' salary to Nan Corcoran, a former Astra employee, after she filed a claim with the Massachusetts Commission Against Discrimination alleging sexual harassment by Bildman. In 1994, Bildman authorized

Astra U.S.A. General Counsel Charles Yon ("Yon") to pay $50,000 to former Astra employee Jennifer Shore in order to settle her claim that Bildman had sexually harassed her. In 1994, Bildman also authorized Yon to pay $95,000 to former Astra employee Jennifer Price to settle her claim that Bildman had terminated her in retaliation for reporting a complaint that another employee had been sexually assaulted by Astra executive George Roadman. Finally, Bildman authorized Yon to execute a Settlement Agreement and General Release dated January 5, 1996 paying former Astra employee Pamela Zortman $100,000 in settlement of her sexual harassment claims against Bildman. (Ex. P to Clauss Aff. Bildman Dep. Vol. VI, pp. 894-896; Ex. 51 to Bildman Dep.). Bildman did not personally disclose these settlements to Astra U.S.A.'s Board of Directors and did not obtain Board approval for them, at least in part because Neal Tully ("Tully"), counsel to and Secretary of Astra U.S.A.'s Board of Directors, advised him that Board approval of the settlements was not necessary. (Tully Dep., pp. 125-126). In addition, Tully himself made various presentations to the Board of Directors in which he discussed and reported various sexual harassment claims and settlements. (Tully Dep., pp. 125-130).

In July of 1994, Bildman approved an Astra U.S.A. Administrative Expense Report completed by Michael Fox ("Fox") which, in addition to 19 other entries, contained a $1,000 contribution by Fox to the Republican Party and a $100 contribution to the Blute for Congress Campaign. In approving expense reports, Bildman did not read the reports or assess each individual item included; he merely signed them. After it was discovered that the reimbursements were improper, Yon wrote Fox, stating that the company had "unknowingly violated the federal election

laws" and instructing him to pay back Astra U.S.A. for the campaign contributions. (Bildman Ex. 48).

In 1995, after Mogren promoted Johansson to the position of Astra AB's Regional Director for North America, giving him direct supervisory authority over Astra U.S.A. and Bildman, the relationship between Bildman and Johansson became severely strained. (7/30/01 Bildman Aff. ¶ 33; Yon Interview, pp. 107-108). Johansson and Bildman repeatedly clashed over Johansson's insistence that he and Astra AB had responsibility for FDA contact in connection with product marketing, while Bildman maintained that Fox, Astra U.S.A.'s Vice President of Regulatory Affairs, had such authority. (2/18/00 Bildman Aff. ¶¶ 11). In addition, Bildman persistently objected that Johansson was micro-managing Astra U.S.A.'s affairs, while Johansson repeatedly criticized Bildman for acting without first obtaining his approval. (2/18/00 Bildman Aff. ¶¶ 13, 16). The relationship between Johansson and Bildman worsened in early 1996, when Astra AB began exploring the possibility of a merger between Astra U.S.A. and Astra-Merck, Inc., a merger to which Bildman was vehemently opposed. (7/30/01 Bildman Aff. ¶ 32).

In a December 19, 1995 telephone conference, Bildman, Yon and Astra U.S.A.'s outside employment counsel William Joy ("Joy") informed Johansson and Staffan Ternby, Astra AB's Director of Public Relations, that *Business Week* was investigating allegations of sexual harassment at Astra U.S.A. (5/11/98 Bildman Aff. ¶ 12). Bildman then assembled a task force to monitor and investigate *Business Week's* investigation of Astra. (5/11/98 Bildman Aff. ¶ 13). The members of the task force were Yon; Joy; Arnold Zenker, a Boston media consultant; Attorney John

Walsh, a New York media and First Amendment lawyer; Ken Rabin, President of InterScience, a national public relations firm and Attorney Andrew Culbert, who had previously worked for Astra AB.

On January 15, 1996, Bildman wrote Mogren and Johansson, stating that a *Business Week* reporter was questioning former and current Astra U.S.A. employees about allegations of incidents of sexual harassment at the company. (Johansson Aff. ¶ 6). Bildman stated that Astra U.S.A. did not have any problems with sexual harassment and that it was unlikely that any article would be written. (Johansson Aff. ¶ 6). Mogren and Johansson did not know and Bildman did not inform them that several claims of harassment had been made against him personally. (Mogren Aff. ¶ 5; Johansson Aff. ¶ 9). On or about January 16, the task force prepared a report concluding that Astra U.S.A. had a good record concerning sexual harassment and that a competitor such as Astra-Merck, Inc. might be behind or involved in *Business Week's* inquiry. (5/11/98 Bildman Aff. ¶ 15). This report was sent to Mogren and Johansson. (Second Set Ans. to Inter. No. 15; Bildman Ex. 58). Johansson told Bildman that he believed that a different competitor, Glaxo, was behind the *Business Week* investigation. (5/11/98 Bildman Aff. ¶ 18; Bildman Ex. 30).

In the Spring of 1996, Leonard Decof recommended to Bildman, Yon and Lars Magnusson that they tape conversations with Astra employees and officers because of the *Business Week* investigation. Bildman taped several phone conversations he had with Mogren and Johansson, as well as other Astra executives, after he became suspicious that they were not acting in the best interests of Astra U.S.A. The taping of conversations occurred in a hotel room in Rhode

Island, where it was not illegal to record conversations without the other party's knowledge. According to Bildman, such taping was standard practice at Astra. (Bildman Dep. Vol. I, p. 164). Bildman never reported his taping of conversations to Astra U.S.A.'s Board of Directors. In April of 1996, Johansson became enraged when Bildman had his staff perform an analysis of Johansson's proposed transfer of products from Astra U.S.A. to Astra Merck, Inc. which showed that the transfer would harm Astra U.S.A. and possibly violate antitrust laws.

On April 19, Mogren, Johansson and several other executives received from Yon a copy of an April 18 letter to Yon from Mark Maremont ("Maremont") at *Business Week*. (Mogren Aff. ¶ 21; Johansson Aff. ¶ 12). Maremont's seven page letter contained detailed and serious allegations of sexual harassment and other misconduct at Astra U.S.A., including misconduct by Bildman. Johansson, accompanied by Astra AB's General Counsel Göran Lerenius ("Lerenius"), and Thomas Clauss, Jr. ("Clauss"), a partner in the law firm of Winthrop, Stimson, Putnam & Roberts, went to Astra U.S.A. to try to learn more about the allegations. On April 22, Joy met with Johansson, Lerenius and Clauss and reviewed seven sexual harassment claims which Joy and You had previously investigated and, in some instances, settled. On April 23, Clauss and Lerenius interviewed Bildman concerning the allegations in the Maremont letter. Bildman denied the allegations in the letter and stated that the questions should be referred to Joy.

On April 25, Johansson received a copy of a 12 page letter from Maremont to Yon containing additional details of sexual harassment at Astra U.S.A. and implicating Bildman. (Ex. 1 to Johansson Aff.). Bildman

spoke to Mogren, Johansson and Clauss during this time and answered their questions concerning the *Business Week* allegations to the best of his ability. (7/30/01 Bildman Aff. ¶ 13).

At a meeting on April 28, 1996, the Astra U.S.A. Directors unanimously voted to establish a Special Committee to retain experts to assist in an investigation of the allegations against Bildman. (Mogren Aff. ¶ 25). Johansson was made chairman of this Special Committee. (Carling Aff. ¶ 6). Bildman was suspended with pay, and Jan Larsson ("Larsson") was appointed as Astra U.S.A.'s President and Chief Executive Officer. (Mogren Aff. ¶¶ 25, 26). That same day, Johansson wrote Bildman informing him of the suspension and stating: "ASTRA expects that during your suspension you will be available during normal business hours to cooperate with the Company's efforts to investigate the allegations and otherwise act in the best interest of the Company and in accordance with the obligations of your employment agreement." The letter further stated, "Because of the investigation, you should not contact any employees or ex-employees of the Company except for the Director of Human Resources if you have questions about health and welfare benefits and Jan Larsson or Göran Lerenius about the investigation. All other employees have or will be instructed not to communicate with you until the investigation is complete." (Ex. 2 to Johansson Aff.).

On April 29, Johansson gave a speech to Astra U.S.A. employees in which he stated:

> The first action is that Mr. Lars Bildman has been suspended and relieved of his corporate responsibilities pending the results of an investigation into allegations of improprieties within the company that occurred during his tenure as

> CEO. Although his future role in the Astra Group is uncertain, he will not be returning to Astra USA in any future capacity.
>
> The second action taken yesterday was that a committee of the Board of Directors of Astra USA has retained independent counsel to assist it in performing the investigation. The investigation is expected to take several weeks, and will include an examination of allegations of sexual harassment and other activities considered inappropriate by the company.

The same day, Astra issued a news release entitled "Astra Elects New President and CEO" which stated:

> Mr. Larsson replaces Lars Bildman, who has been suspended and relieved of his corporate responsibilities pending the results of an investigation into allegations of improprieties within the company that occurred during his tenure as CEO. . . .
>
> The investigation is expected to take several weeks, and will include an examination of allegations of sexual harassment and other activities considered inappropriate by the company. .
>
> A preliminary investigation by senior company officials resulted in the decisions announced today.

Also on April 29, Astra issued a press release containing identical statements.

The Board of Directors retained Winthrop, Stimson, Putnam & Roberts to conduct the investigation. Clauss oversaw a team of lawyers and paralegals which interviewed over 100 witnesses, including present and former Astra U.S.A. employees and officers, subcontractors and vendors, and officers and employees

of other Astra Group companies. (Clauss Aff. ¶¶ 2-6). In addition, the team reviewed thousands of pages of documents and other materials, including files from Astra U.S.A.'s finance, personnel and legal departments, and documents from vendors and subcontractors, including outside counsel who had handled the sexual harassment claims. (Clauss Aff. ¶¶ 2-6). During the investigation, Bildman contacted or attempted to contact at least 18 Astra employees, 14 of whom were individuals being interviewed by Astra's investigators. (Bildman Dep. Vol. V, pp. 771-780; Healey Aff. ¶¶ 5-7).

On May 3, 1996, the *Wall Street Journal* published an article entitled "Astra USA Investigates Alleged Misuse of its Funds by Suspended CEO, Others" which stated:

> [spokesman] Mr. Kincannon said that Astra AB officials grew concerned when Mr. Bildman was 'not forthcoming' to them in handling inquiries from *Business Week* magazine about possible sexual harassment at Astra USA. "He assured them that nothing was wrong," Mr. Kincannon said.

That same day, the *Boston Globe* published an article entitled "Astra: CEO Allegedly Harassed Women: Says suspended Bildman also tried to cover up actions" which stated: "Bildman told executives at Astra USA's Stockholm parent company last December that a reporter was looking into sexual harassment claims at its US subsidiary, said Benjamin Kincannon, Astra U.S.A. spokesman. But 'he downplayed it,' Kincannon said."

On May 13, 1996, Mogren addressed Astra's Annual Meeting on the issue of "Improprieties at Astra USA, Inc." and stated:

> But as a result of preliminary investigation at the end of April, we were able to confirm that a violation had been made of the fundamental principles for working at Astra and of the culture that we have developed in the Group as a whole. . . .
>
> Concerning the sexual harassment now in question, it should be said that what has occurred is at beast a violation of good style and form. At worst, a number of our employees have also been caused inconveniences or suffering. To the extent this may have occurred, we are deeply regretful. We will do everything we can to prevent it from ever happening again. . . .
>
> As soon as we in Astra's corporate management, through our preliminary investigation, were practically certain that serious had happened, we swiftly set in a number of measures.
>
> First, the CEO and two colleagues of the American subsidiary were suspended. . . .
>
> What has happened is that some people have tried to put themselves above the rules, at the same time that they have made great efforts to cover up what has happened.

Also on May 13, *Business Week* published an article by Maremont entitled "Abuse of Power: the astonishing tale of sexual harassment at Astra's U.S. pharmaceutical subsidiary." The article contained the following statements:

> On April 29 as *Business Week* was about to publish the results of a six-month investigation into allegations of rampant sexual harassment at Astra, Bildman was suspended and relieved of his responsibilities by Astra's parent, giant Swedish drug-maker Astra AB. . . .

> Senior Astra executives acknowledged that *Business Week's* investigation sparked the abrupt action. Although Bildman had told superiors about the investigation months ago, Carl-Gustaf Johansson, a member of Swedish Astra's executive committee, says the company was unaware of the full scope of the allegations until it received a lengthy letter from *Business Week* on April 19. "We hadn't heard anything this detailed—and certainly not that Mr. Bildman himself was the focus" of some allegations, says Johansson. Refusing further comment on Astra's own preliminary inquiries—which also now include allegations of major financial improprieties by Bildman—Johansson says Astra suspended its U.S. CEO because "we lost some trust in him."

On May 24, 1996, the *Boston Globe* published an article entitled "Astra AB's chief says Bildman won't be back," which stated:

> Astra AB Chief Executive Håkan Mogren said Lars Bildman, the suspended chief executive of the company's scandal-plagued U.S. unit in Westboro, will not return to the position he had occupied for the past 15 years.
>
> "It would be impossible to have him back in that job. How could people work together and create a good atmosphere?" Mogren said in New York.

Also on May 24, the *Boston Herald* published an article entitled "Suspended Astra Exec Won't Return" which contained identical statements.

In May of 1996, Kincannon appeared on a CBS News "Eye on the Nation" segment concerning the allegations of sexual harassment at Astra U.S.A.

When asked whether Bildman would return to Astra U.S.A., Kincannon replied that he would not. Kincannon based this response on newspaper reports that, according to Mogren, Bildman would not be returning.

Throughout the investigation, Bildman, through his counsel, declined to be interviewed or to answer questions in person posed by the Special Committee, either orally or in writing. (Clauss Aff. ¶¶ 12-17). Counsel for Bildman met with the investigators, provided a denial of the general allegations of misconduct and offered to produce additional information to investigators if they would state the specific basis for the allegations. Although Bildman requested that Astra provide him with a list of specific allegations being investigated so that he could respond, the investigators refused to do so. However, on June 7, 1996, Astra investigators wrote Bildman's counsel, setting forth a list of nine specific questions for him to answer. Bildman did not respond to this letter. In refusing to cooperate, Badman consistently expressed concern about the bias and pre-ordained results of the investigation.

The Special Committee presented Astra U.S.A.'s Board of Directors with a Draft Report on June 13, 1996, describing the scope of its investigation and summarizing its conclusions. The Draft Report opined that there was substantial evidence that Bildman had engaged in the sexual harassment of female employees, received personal benefits from services performed by Astra vendors and paid for by Astra, received reimbursement for improper business expenses such as personal vacations, travel, and legal fees for personal matters and attempted to impede the investigation by contacting Astra employees and

vendors and destroying documents. (Ex. D to Clauss Aff.). On June 25, 1996, Johansson and Clauss presented the Special Committee's final report to the Board of Directors. The Board unanimously voted to terminate Bildman's employment for cause under paragraph 4(f) of the Employment Agreement. (Ex. E to Clauss Aff.; Johansson Aff. ¶ 26). Despite prior notification that the Board intended to vote on his termination, Bildman declined to attend the June 25 meeting. (Johansson Aff. ¶¶ 24-25).

On June 26, 1996, Astra AB issued a news release which stated:

> Astra USA today announced the termination of Lars Bildman, the former President and CEO of the company. Bildman had been suspended on April 28, 1996 pending the results of an investigation into improprieties within the company that occurred during his tenure as CEO. . . .
>
> Bildman's termination was announced at a press conference at which Astra officials commented on the investigation by the company into allegations of sexual harassment, financial improprieties, and other activities considered inappropriate by the company.
>
> Bildman chose not to cooperate with the investigation.
>
> "Our investigation uncovered management behavior under Mr. Bildman that is unacceptable to Astra," said Executive Vice President C.G. Johansson of Astra AB, who headed the investigating committee established by the Board of Astra USA. . . .

> The investigation showed evidence of a variety of improper activities, including misuse of company funds, inappropriate behavior at company functions, disregard of established company rules and procedures, and a neglect by Mr. Bildman to keep the parent company informed of these problems at its subsidiary.
>
> There is evidence that Mr. Bildman used company funds for personal expenses, including renovations to his houses and vacations. Approximately $2 million was involved. . . .
>
> According to Astra's investigation, Bildman attempted to deflect attention away from himself by claiming that enemies of the company were behind the media's scrutiny of Astra USA and himself. There is no evidence to support this.
>
> Astra's investigation did show that Mr. Bildman went to great lengths to keep his behavior secret from the superiors in the Astra Group. He rented office space offsite for the purpose of keeping information from the parent company. . . .

Astra also issued a press release on June 26 containing identical statements.

At a press conference on June 26, Johansson stated:

> In December, Mr. Bildman informed me that a journalist was making inquiries about Astra USA that included questions about alleged sexual harassment at the company. Mr. Bildman assured me that there was nothing to worry about He also did not mention that he himself was a focal point of the inquiries.
>
> Mr. Bildman was asked on a number of occasions after that whether any of the allegations

involved him. He was also asked whether Astra USA had anything to be ashamed of He said no.

On April 19, we received in Sweden a letter from *Business Week*. . . We were shocked by what we read. . . .

Mr. Bildman refused to cooperate with the investigation. . . .

Mr. Bildman was terminated because he violated the trust that had been placed in him by the Astra Group. His style of leadership was unacceptable. And certain of his actions were unprofessional and hurtful to the morale of the employees.

Our investigation also found that Mr. Bildman exhibited inappropriate behavior at company functions, primarily internal sales meetings held off company premises. . . .

There is evidence that Mr. Bildman used company funds for personal expenses, including renovations to his houses and vacations. Approximately $2 million was involved. . . .

Our investigation also showed that Mr. Bildman went to great lengths to keep his behavior secret from his superiors in the Astra Group. He rented office space offsite for the purpose of keeping information from the parent company.

According to our investigation, Bildman attempted to deflect attention away from himself by claiming that enemies of the company were behind the media's scrutiny of Astra USA and himself. There is no evidence to support this.

In all of these activities, Mr. Bildman displayed a disregard for both established rules and proce-

> dures of the Astra Group and for the high ethical principles that are implicit in our corporate culture. . . .
>
> Because of the unprofessional actions of one person in one of our 45 subsidiaries, the Astra name has become associated with activities that are the complete opposite of the high ethical and moral principles for which we have been known for over eight decades. . . .
>
> But there is no doubt that Lars Bildman abused his power as President of Astra U.S.A. Our investigation uncovered management behavior under Mr. Bildman that is unacceptable to Astra. . . .
>
> This is the end of an unfortunate and distasteful chapter in the history of Astra U.S.A.

Following his suspension and termination, Bildman became severely depressed. He experienced difficulty sleeping and suffered from stomach aches. (7/30/01 Bildman Aff. ¶ 29). He met with a psychiatrist through October of 1996 and was prescribed prozac and klonopin. (7/30/01 Bildman Aff. ¶ 29). When Bildman was terminated, Astra's Human Resources Department determined all amounts he had earned or vested under the applicable compensation, bonus and benefit plans, and distributed said amounts according to the terms of the plans and certain orders of the Norfolk County Probate Court.[4] (Tetrault Aff. ¶ 8).

At the time of his termination, Bildman was a participant in Astra's Long Term Management Stock Plan and its Profit Sharing Plan. Under his Employment Agreement, Bildman was also entitled to participate in the Executive Bonus Program, which

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[4] Bildman was in the process of obtaining a divorce in Norfolk County Family and Probate Court Action No. 96D-2672-DIV.

entitled him to earn a bonus above his base salary depending on Astra AB's performance. (6/30/01 Bildman Aff. ¶ 12; Tully Dep., p. 96). Although Astra paid Bildman executive bonuses for 1993 and 1994, it never paid him executive bonuses earned for 1995 and 1996.

Participants in the Long Term Management Stock Plan are eligible for annual grants of Astra AB common stock but may only earn stock rights over a period of years if certain performance goals are achieved. (Ex. 2 to Tetrault Aff., p. 4). Following the expiration of the required three year holding period, on January 1, 1996, Bildman received a distribution of 7,172 shares of stock, with a value of $286,808. (Tetrault Aff. ¶ 9d). A portion of Bildman's potential executive bonus had been shifted to the Stock Plan. (Tully Dep., p. 96). Accordingly, on March 13, 1996, Bildman received a 1996 Award Statement and executed a Letter Agreement for the grant of Astra AB stock equal to $150,000 for the 1996 plan year, with 25 percent of the grant to be earned in each year in which pre-established performance goals were met. (Ex. 3 to Tetrault Aff.). Since the first performance objective was not measured until the end of 1996, Bildman did not and could not have met it as of the date of his termination. (Tetrault Aff. ¶ 9g). The 1996 Award Statement was also subject to the terms of the Stock Plan, which provided that upon termination for cause, "no shares shall be released to the Participant unless performance objectives and the Holding Period have been satisfied. Shares for which the performance objectives and Holding Period have not been satisfied shall be forfeited."

The Profit Sharing Plan entitled Bildman to obtain compensation based on the performance of Astra AB.

The Plan states that "[i]f a Participant's employment is terminated for any reason other than his death, Disability or attainment of Normal Retirement Age, he shall be entitled to receive his vested Account balance." (Ex. 5 to Tetrault Aff.). Bildman's vested account balance as of June 30, 1996 was $90,917.77. (Tetrault Aff ¶ 10c). Astra distributed this balance to Bildman and his former wife in accordance with a May 12, 1998 Order of the Norfolk Probate and Family Court. (Tetrault Aff. ¶ 10(e)). According to Bildman, although Astra paid him profit sharing for 1993 and 1994, it never paid him profit sharing earned for 1995 and 1996. (6/30/01 Bildman Aff. ¶ 12).

On January 26, 1998, following several days of trial in the local United States District Court before the Honorable Nathaniel Gorton, Bildman pleaded guilty to Counts 27 through 29 of a Superseding Indictment which charged him with committing the crime of willfully making and subscribing a tax return which he did not believe to be true and correct for the calendar years 1993, 1994 and 1995. Count 27 of the Superseding Indictment (False Tax Return 26 U.S.C. §7206(1)) stated:

> 29. The grand jury realleges and incorporates by reference paragraphs one through seven and ten through twenty-one of this indictment, and further charges that:
>
> 30. On or about April 15, 1994, in the District of Massachusetts and elsewhere, defendant LARS BILDMAN a resident of Brookline, Massachusetts, did willfully make and subscribe a joint United States Individual Income Tax Return, for the calendar year 1993, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the

Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that said return reported an adjusted gross income of $1,008,548.00, whereas, as he then and there well knew and believed, he received compensation in the form of goods and services in addition to that reported on his filed income tax return.

All in violation of Title 26 United States Code, Section 7206(1).

Count 28 of the Superseding Indictment (False Tax Return 26 U.S.C. § 7206(1)) stated:

31. The grand jury realleges and incorporates by reference paragraphs one through seven and ten through twenty-one of this indictment, and further charges that:

32. On or about October 24, 1995, in the District of Massachusetts and elsewhere, defendant LARS BILDMAN a resident of Brookline, Massachusetts, did willfully make and subscribe a joint United States Individual Income Tax Return, for the calendar year 1994, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that said return reported an adjusted gross income of $1,030,916.00, whereas, as he then and there well knew and believed, he received compensation in the form of goods and services in addition to that reported on his filed income tax return.

All in violation of Title 26 United States Code, Section 7206(1).

Count 29 of the Superseding Indictment (False Tax Return 26 U.S.C. § 7206(1)) stated:

> 33. The grand jury realleges and incorporates by reference paragraphs one through seven and ten through twenty-one of this indictment, and further charges that:
>
> 34. On or about April 14, 1996, in the District of Massachusetts and elsewhere, defendant LARS BILDMAN a resident of Brookline, Massachusetts, did willfully make and subscribe a joint United States Individual Income Tax Return, for the calendar year 1995, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that said return reported an adjusted gross income of $1,124,373.00, whereas, as he then and there well knew and believed, he received compensation in the form of goods and services in addition to that reported on his filed income tax return.
>
> All in violation of Title 26 United States Code, Section 7206(1).

Paragraphs 1 through 7 and 10 through 21 of the Superseding Indictment allege a conspiracy whereby Bildman and Lars Magnusson obtained over one million dollars worth of personal benefits, including home improvements, landscaping, home furnishings, personal vacations and prostitutes, which were allegedly paid by Astra under the guise of business expenses.

In a change of plea hearing on January 26, 1998, an Assistant United States Attorney ("AUSA") told

the court that "Mr. Bildman is offering a plea to Counts 27, 28 and 29, Paragraph 30, 32 and 34 contained in those." The AUSA then stated that "the full conversation in chambers was that the preliminary paragraph in each of those counts incorporates by reference some of the earlier language in the indictment. The Government does not understand Mr. Bildman to be pleading to the fraud language but is relying upon the language which is—which lays out the items of income which Mr. Bildman received, and in that extent alone the Government is relying upon that introductory paragraph." Bildman's attorney stated that he understood, "Not as to each and every item, but certainly the substantial number of items which constitute the false statement in the tax return."

When the court asked the AUSA what facts the Government would prove if the matter proceeded through trial, the AUSA stated:

> as the government outlined in its opening statement and so as to not repeat each and every thing that was said during the opening statement, I will rely upon that; but as the Government set forth in its opening statement, Your Honor, the Government would prove beyond a reasonable doubt that should this trial continue to a verdict, that Defendant Bildman received goods and services which were taxable to him, that he knew that those goods and services were to be reported on his Individual Income Tax Return, Form 1040, and that he did not report the value of those goods and services on his Income Tax Returns filed with the United States under the penalties of perjury on or about the dates set forth in Counts 27 through 29 Your Honor.

(Ex. 6 to Bildman Dep. pp. 5-12, 5-13). Bildman agreed with this statement of the facts. (Ex. 6. to Bildman Dep., p. 5-13). At the sentencing hearing, the court found that Bildman's unreported income was in excess of $1 million and that Bildman used a sophisticated means to impede the discovery of his crime.

On February 4, 1998, Astra U.S.A. filed Civil Action No. 98-0580 against Bildman, alleging fraud in Count I of the complaint, breach of fiduciary duty in Count II, waste of corporate assets in Count III and conversion in Count V. The complaint sought recission of the Employment Agreement in Count IV. Also on February 4, Ivan Rowley, President of Astra U.S.A., announced a settlement of sexual harassment charges against the company, stating:

> In May, 1996, the Equal Employment Opportunity Commission initiated its investigation into allegations of sexual harassment at Astra USA. Before that, Astra had begun its own internal investigation and had suspended the CEO and two other senior executives. Astra took these actions immediately after learning of the allegations.
>
> Astra's cooperation with the EEOC investigation was a natural extension of Astra's own investigation and other steps already taken by the company. Our cooperation was based on a common desire with the EEOC to get at the truth and rectify whatever damage had been done to current and former Astra employees.

On February 5, 1998, Astra U.S.A. issued a press release containing identical statements.

Also on February 5, the *Boston Globe* published an article entitled "$10M Astra Settlement is Expected" which stated:

> A federal agency is expected today to announce that Astra USA Inc. agreed to pay $10 million to settle allegations of sexual harassment and attempts to cover it up during the scandalous tenure of ousted chief executive Lars Bildman. . . .
>
> Astra USA said it wants "any amounts paid as a result of the investigation" by EEOC. Sources familiar with the negotiations put the settlement at $10 million. . . .
>
> "His actions—asking people to destroy records and the like—are in our estimation an attempt to cover up and keep things from his superiors in the company," Astra USA's spokesman, Benjamin Kincannon, said yesterday.

The *Middlesex News* published an article on February 5 entitled "Astra Settles Federal Harassment Suit: Record Setting Deal Ends EEOC Probe" which reported Astra's filing of a lawsuit against Bildman and stated: "Kincannon said that the rest of the damages would cover legal costs, including the cost of an internal investigation in early 1996. Astra's lawsuit also demands that Bildman repay the company for any fines and settlements from the EEOC investigation." On February 6, 1998, the *Boston Herald* published an article entitled "Astra-Nomical: firm settles sex harass claims for $9.85 Million" which also referred to Astra's civil suit stating: "Astra admitted the suit is partly an effort to stick the former CEO with the bill for EEOC settlement."

Thereafter, on April 28, 1999, Bildman filed Civil Action No. 99-1942 against Astra AB, Mogren and

Johansson, alleging intentional interference with contractual relations in Count I of his complaint and intentional infliction of emotional distress in Count II

On October 12, 2000, Bildman filed an amended counterclaim and third-party complaint against Astra, Mogren and Johansson in Civil Action No. 98-0580. Count I of the counterclaim alleges breach of contract against Astra; Count II seeks indemnification from Astra for costs and expenses incurred in this action; Count III seeks indemnification for costs and expenses incurred in connection with the 1998 indictments and Counts IV, VI and VII[5] allege libel against Astra, Mogren and Johansson.

DISCUSSION

Summary judgment shall be granted where there are no genuine issues as to any material fact and where the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); *Cassesso v. Commissioner of Correction*, 390 Mass. 419, 422 (1983); *Community Nat'l Bank v. Dawes*, 369 Mass. 550, 553 (1976). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, and that the summary judgment record entitles the moving party to judgment as a matter of law. *Pederson v. Time, Inc.*, 404 Mass. 14, 16-17 (1989). The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial. *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 809 (1991); *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991).

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[5] The counterclaim does not include a Count V.

I. Cross-Motions for Summary Judgment on Count I of Bildman's Counterclaim

Count I of Bildman's counterclaim alleges that Astra breached the June 15, 1996 Employment Agreement by refusing to pay him bonuses and other compensation earned before his suspension on April 28, 1996 and his termination on June 25, 1996. Count I also alleges that Astra breached the Employment Agreement by refusing to pay Bildman's reasonable legal fees and expenses incurred in challenging his termination and enforcing his rights under the agreement. Astra moves for summary judgment on this count, asserting that because it had cause to terminate Badman under the Employment Agreement, it has no further obligations to him with respect to either compensation or legal fees.

It is well-established that a material breach of contract by one party excuses the other party from future performance under the contract *Quintin Vespa Co. Inc. v. Construction Serv. Co.*, 343 Mass. 547, 554 (1962); *Hastings Assoc., Inc. v. Local 369 Bldg. Fund, Inc.*, 42 Mass. App. Ct. 162, 171, rev. den., 424 Mass. 1108 (1997). Paragraph 4(f) of the Employment Agreement provides that upon termination for cause under that paragraph, Astra U.S.A. "shall have no further obligation to the Employee hereunder, except any obligation under any compensation or benefit plan in which the Employee is then a participant." However, the Profit Sharing Plan entitles an employee who is terminated for cause to receive his vested account balance, and therefore Astra is not relieved of its obligations under the plan by virtue of Bildman's alleged material breach of the Employment Agreement. See *Walsh v. Atlantic Research Assoc., Inc.*, 321 Mass. 57, 62-63 (1947) (concluding that employee

who was justifiably terminated for materially breaching his employment contract could still recover earned compensation where contract so provided). On the present summary judgment record, an issue of disputed fact exists with respect to whether Astra has satisfied its obligations under the Profit Sharing Plan. Thus, Astra is not entitled to judgment as a matter of law on Count I insofar as it alleges breach of contract based on profit sharing.

Count I of Bildman's counterclaim also alleges that Astra breached the Employment Agreement by failing to pay him an executive bonus, part of which was earned under Astra's Stock Plan. Under the Stock Plan, an employee terminated for cause forfeits any unvested shares. Astra contends that the summary judgment record demonstrates as a matter of law that it properly terminated Bildman for cause.

Paragraph 4(f) of the 1993 Employment Agreement between Bildman and Astra U.S.A. provides in relevant part:

> The Employee's employment hereunder may be terminated for cause by the Company, effective immediately, by a vote of a majority of all of the members of the Board of Directors, on written notice to the Employee setting forth in reasonable detail the nature of such cause. For purposes of this Agreement, "cause" means only: (i) the willful commission by the Employee of theft, embezzlement, fraud or other serious and substantial crimes against the Company, or (ii) other acts or omissions materially evidencing bad faith toward the Company, or (iii) conviction of the Employee of any criminal offense involving dishonesty or breach of trust or any felony. . . .

In order to properly terminate Bildman under Paragraph 4(j), Astra had to have a reasonable, good faith basis for believing he had engaged in misconduct which, under the terms of the Employment Agreement, would justify his termination. Compare *Goldhor v. Hampshire Coll.*, 25 Mass. App. Ct. 716, 722 (1987); *Klein v. President & Fellows of Harvard Coll.*, 25 Mass. App. Ct. 204, 208 (1987); *Hamilton v. Baystate Med. Educ. & Research Found.*, 866 F. Supp. 51, 55 (D. Mass. 1994), aff'd, 66 F.3d 306 (1st Cir. 1995) (in absence of contractual definition, "just cause" permits termination of employee where there exists reasonable, good faith basis for employer dissatisfaction such as culpable or inappropriate behavior).

Astra contends that in analyzing whether there was cause to terminate Bildman, this Court must give deference to the Board of Directors' decision under the business judgment rule, which shields officers and directors from liability for corporate decisions made in good faith after due care. See *Abbot v. Waltham Watch Co.*, 260 Mass. 81, 93 (1927); *Resolution Trust Corp. v. Gladstone*, 895 F. Supp. 356, 369 (D. Mass. 1995). Compare *Foster v. Churchill*, 626 N.Y.S.2d 115, 118 (A.D. 1 Dept. 1995), aff'd, 87N.Y.2d 744 (1996) (concluding that under Delaware law, business judgment rule applied to company's decision to terminate two officers, affording presumption that decision made in good faith and in company's best interest). However, the business judgment rule does not apply where a plaintiff alleges and demonstrates self-dealing by the board, or bad faith or unreasonableness in the investigation leading to the board decision. See *Harhen v. Brown*, 431 Mass. 838, 844-847 (2000) (discussing corporate board's decision not to pursue litigation demanded by shareholders); *Johnson v. Witowski*, 30 Mass. App. Ct. 697, 712, rev. den.,

411 Mass. 1104 (1991) (discussing board's approval of corporate acquisition transaction).

Because the summary judgment record raises a fundamental underlying dispute as to whether the Board's investigation of Bildman and decision to terminate him were undertaken objectively, fairly and in good faith, at least for purposes of the present motions this Court will not afford the Board's decision any deference or presumption of good faith. See, e.g., 7/30/01 Bildman Affidavit; Solvell Deposition, pp. 693-697; DeCof Deposition, pp. 82-83, 103, 121, 142; Clauss Deposition, pp. 6-9, 166-168; Ianelli Deposition, pp. 202-208; Aarons Deposition, pp.720-725; Lasagna Deposition, pp. 28-71; Bildman Exhibits 4, 11-17, 70, 72, 74, 76.

Astra contends that Bildman's plea to three tax felonies constitutes cause for termination under Paragraph 4(f) (iii) of the Employment Agreement as a matter of law.[6] Invoking the after-acquired evidence doctrine, Astra contends that Bildman's guilty plea on January 26, 1998 to filing a false tax return, because the improper tax filings occurred when he was Astra U.S.A.'s President, constitutes cause for termination under Paragraph 4(f)(iii) even though his plea was entered after his termination.

In the employment context, after-acquired evidence refers to evidence of an employee's wrongdoing, discovered by the employer after terminating the employee, that would have justified the employee's immediate termination had it been discovered

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[6] Under Massachusetts law, a "conviction" occurs when there has been a finding of guilt by a jury or judge, entry of a formal guilty plea or admission to sufficient facts. *Commonwealth v. Jackson*, 45 Mass. App. Ct. 666, 670 (1998).

earlier. See *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 356 (1995). Many jurisdictions allow an employer to assert after-acquired evidence as a complete bar to an employee's contract-based wrongful discharge claim and to limit the measure of equitable relief and damages in statutory wrongful discharge claims such as those involving discrimination or retaliation under workers' compensation schemes. See Anna, "After-Acquired Evidence," 34 A.L.R. 5th 699 (1995); accord Restatement (Second) of Contracts § 237, comment c, illustration 8 (1979). Assuming without deciding that Massachusetts law allows an employer to assert after-acquired evidence of an employee's misconduct as a complete bar to the employee's breach of contract claim,[7] Bildman's federal tax convictions nonetheless do not constitute a defense in the present case.

Astra has not cited, nor has this court found, authority in any jurisdiction establishing that an employee's conviction of a crime after his discharge may be used as after-acquired evidence to justify

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[7] In the only Massachusetts case to address after-acquired evidence, the court held that with respect to a claim under G.L. c. 151B, an employer could not use after-acquired evidence of wrongdoing to justify an employee's termination. See *Boston v. Massachusetts Comm'n Against Discrimination*, 39 Mass. App. Ct. 234, 239-240 (1995). Similarly, the First Circuit has followed the reasoning of the Supreme Court with respect to statutorily-based wrongful discharge claims, concluding that because there is an overriding public policy at stake in such cases, after-acquired evidence of employee misconduct does not bar all recovery but rather limits the employee's damages. See *Nieves-Villanuera v. Soto-Rivera*, 133 F.3d 92, 101 (1st Cir. 1997) (claim under 42 U.S.C. § 1983 that discharge was due to employees' political affiliation); *Serafino v. Hasbro, Inc.*, 82 F.3d 515, 519 (1st Cir. 1996) (claim that discharge was retaliation for employee's exercise of First Amendment rights).

termination under an employment contract permitting termination for conviction of a crime. Cf. *Washington v. Lake County*, 969 F.2d 250, 256 (7th Cir. 1992), modified, by *McKennon*, 513 U.S. 352 (concluding that employee's conviction of crime before his hiring, and his concealment of that conviction on his employment application, constituted after-acquired evidence which may provide defense to wrongful termination claim). Aside from cases involving after-acquired evidence of resume fraud, in all the reported cases the employee misconduct proffered as after-acquired evidence occurred during the term of the employment and thus provided a legal ground for terminating the employee at the time of the actual discharge. See, e.g., *McDill v. Environamics Corp.*, 757 A.2d 162, 165-166 (N.H. 2000) (after-acquired evidence that employee copied confidential facsimile before his termination); *Gassman v. Evangelical Lutheran Good Samaritan Sod., Inc.*, 921 P.2d 224, 225-226 (Kan. App. 1996), aff'd, 935 P.2d 743 (1997) (after-acquired evidence that before her termination, employee violated company policy by entering director's office without authorization and taking copy of videotaped meeting); *Schuessler v. Benchmark Mktg. & Consulting, Inc.*, 500 N.W.2d 529, 539-540 (Neb. 1993) (after-acquired evidence that vice-president, during employment, sexually harassed female employee).

In this case, although Astra contends that the misconduct underlying Bildman's convictions occurred while he was employed as President, the convictions themselves did not occur until after Astra had terminated his employment. The convictions thus could not have provided "cause" for Bildman's discharge on the date of his termination, June 25, 1996. Accordingly, Astra is not entitled to summary judgment on Count I of Bildman's counterclaim on the ground that

Bildman's conviction of the federal tax felonies constitutes cause for his termination under Paragraph 4(f)(iii) of the Employment Agreement.

Astra also moves for judgment as a matter of law under Paragraph 4(j)(i) of the Employment Agreement, which provides that "the willful commission by the Employee of theft, embezzlement, fraud or other serious and substantial crimes against the Company" constitutes cause for termination. Astra contends that in the course of pleading guilty to three counts of filing a false tax return in violation of 26 U.S.C. § 7206(1), Bildman admitted that he received the benefit of home renovations, prostitutes and family vacations paid for by Astra and is thus collaterally estopped from relitigating in this action whether he in fact received such benefit. Therefore, according to Astra, Bildman as a matter of law committed theft or fraud sufficient to justify his termination. Specifically, Astra argues that by pleading guilty to Counts 27, 28 and 29 of the Superseding Indictment, Bildman admitted the factual allegations underlying those charges and incorporated by reference therein. Bildman, however, denies admitting to those underlying facts. He claims that he pleaded only to Paragraphs 30, 32 and 34 of Counts 27, 28 and 29, which contain allegations concerning the legal elements of the crime of filing a false tax return but do not contain or incorporate by reference any of the specific facts underlying the charges.

Under the doctrine of collateral estoppel, or issue preclusion, when an issue of fact or law is actually litigated and determined by a final judgment, and the determination is essential to that judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a differ-

ent claim. *Treglia v. MacDonald*, 430 Mass. 237, 240 (1999); *Fireside Motors, Inc. v. Nissan Motor Corp.*, 395 Mass. 366, 372 (1985). The purpose of collateral estoppel is to conserve judicial resources, prevent unnecessary costs associated with multiple litigation, and ensure finality of judgments. *Treglia v. MacDonald*, 430 Mass. at 240. The party asserting collateral estoppel bears the burden of showing that all prerequisites to its application exist. *Carrasquillo v. Commonwealth*, 422 Mass. 1014, 1015 (1996); *Fireside Motors, Inc. v. Nissan Motor Corp.*, 395 Mass. at 373.

A party to a civil action against a former criminal defendant may invoke collateral estoppel to preclude the defendant from relitigating any issue actually decided in the criminal prosecution. *Aetna Cas. & Sur. Co. v. Niziolek*, 395 Mass. 737, 742 (1985). Here, a careful examination of Bildman's plea hearing reveals that he did not specifically admit to the facts underlying the charges which alleged that his unreported income consisted of home renovations, prostitutes or family vacations paid for by Astra.[8] Thus, Bildman's guilty pleas do not establish as a matter of law that Astra had cause to terminate him under

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[8] This same conclusion was earlier reached by another judge of this Court. In a Memorandum of Decision and Order dated June 15, 1998, Judge Kottmyer denied Bildman's motion for an order requiring Astra to provide advance payment of expenses incurred in defending this suit, noting that "while Bildman's admission that he received the services described in the indictment was material to and a necessary predicate for the guilty pleas, the question whether Astra approved payment of these expenses was left open by the guilty pleas. Further, whether Bildman personally obtained a financial profit to which he was not legally entitled is not established by the guilty plea. Because the factual basis of the guilty pleas did not encompass allegations of fraud on Astra, indemnification is not barred . . ."

Paragraph 40(i) of the Employment Agreement for "the willful commission by the Employee of theft, embezzlement, fraud or other serious and substantial crimes against the Company."

Indeed, although Bildman admits that the expenditures at issue were not explicitly authorized by Astra U.S.A.'s Board, he has proffered evidence which creates an issue of disputed fact with respect to whether he as President was subject to Astra's Travel and Expense Policy, whether family vacations and escort services fell within his broad authority as President to incur expenses so long as the expenses served a business purpose and were within budget, whether use of Astra contractors for personal services violated Astra policy, whether other Astra executives also charged personal work by Astra contractors to the company and whether he either paid various landscaping and architectural contractors directly or received their services gratis as a personal favor. See, e.g., 6/30/01 Bildman Affidavit; 7/30/01 Bildman Affidavit; Zimmerman Affidavit; Yon Deposition, Vol. IV, pp. 145-146; Morash Deposition, pp. 136-142.

Astra next contends that it properly terminated Bildman for cause under Paragraph 4(j)(ii) of the Employment Agreement for committing numerous acts which constituted a breach of fiduciary duty to Astra, thus "materially evidencing bad faith toward the Company." First, Astra argues that Bildman's violations of the Federal Election Campaign Act, 2 U.S.C. §§ 431 *et. seq.*, ("FECA") constituted a breach of fiduciary duty warranting his termination because such violations exposed the company to potential liability. It is undisputed that on two occasions Bildman authorized reimbursement of Astra employees with Astra funds for campaign contributions to federal

candidates for office, in violation of 2 U.S.C. § 441b(a). However, the undisputed evidence also shows that Bildman did not intentionally violate FECA but at worst was negligent in signing expense reports without reading each individual item and perhaps in failing to seek the advice of counsel with respect to whether campaign contributions could properly be reimbursed.

Under Massachusetts law, a corporate officer has a fiduciary duty to act in good faith and with reasonable intelligence and will not be held responsible for mere error of judgment or lack of prudence unless it rises to the level of clear and gross negligence. *Allied Freightways, Inc. v. Cholfin*, 325 Mass. 630, 634 (1950); *Murphy v. Hanlon*, 322 Mass. 683, 686 (1948); *Spiegal v. Beacon Participations, Inc.*, 297 Mass. 398, 410-411 (1937). Compare G.L. c. 156B, § 65 (stating that a corporate officer shall perform his duties with such care as an ordinarily prudent person in a like position would use under similar circumstances). Astra has not cited nor has this court found any case stating that, as a matter of law, a corporate officer's unintentional violation of a statute which exposes the company to potential liability constitutes a breach of fiduciary duty. Cf. *Miller v. AT&T Co.*, 507 F.2d 759, 762-763 (3d Cir. 1974) (concluding that shareholder complaint stated claim for breach of fiduciary duty by alleging that corporate directors violated FECA by making $1.5 million contribution to the DNC and that said contribution constituted corporate waste). No evidence in the summary judgment record shows that Bildman's signing of the expense report without examining each individual item or his failure to recognize a FECA violation constitutes gross negligence so as to constitute a breach of fiduciary duty under Massachusetts law.

Finally, to the extent that Astra invokes Paragraph 4(j)(ii) of the Employment Agreement, that paragraph defines cause as "acts or omissions materially evidencing bad faith toward the Company." In the context of corporate law, bad faith is not simply poor judgment or mere negligence but rather implies a dishonest purpose or conscious wrongdoing. *Spiegal v. Beacon Participations, Inc.*, 297 Mass. at 416. No evidence in the summary judgment record demonstrates that Bildman's violation of FECA involved bad faith. Accordingly, Astra is not entitled to summary judgment on the ground that Bildman's FECA violations constituted cause for his termination.

Astra also contends that Bildman's admission that he secretly taped conversations with other Board members and Astra officers constitutes a breach of fiduciary duty which materially evidences bad faith toward the company, justifying his termination under Paragraph 4(j)(ii) of the Employment Agreement. Astra does not cite nor has this Court found any authority for the proposition that the secret tape recording by a corporate officer of his conversation with another corporate officer constitutes as a matter of law a breach of fiduciary duty. Cf. *Peterson v. West*, 122 F Supp. 2d 649, 656-657 (W.D. N.C. 2000) (concluding employee's act of secretly taping a conversation with his superior, coupled with numerous other acts of insubordination, constituted legitimate, nondiscriminatory reason for terminating him); *Ingram v. Pre-Paid Legal Serv., Inc.*, 4 F. Supp.. 2d 1303, 1313 (E.D. Okla. 1998) (concluding employee's secret tape recording of conversations with his supervisors constituted insubordination justifying termination); *Fouraker v. Publix Super Markets*, 959 F. Supp. 1504, 1509-1510 (M.D. Fla. 1997) (concluding employee's act of tape recording a meeting with his superiors in

violation of supervisor's orders not to record such meetings was insubordination justifying his termination). In addition, the summary judgment record reveals a disputed issue of fact as to whether the tape recording of conversations among officers and directors, without disclosure and permission, was a common practice at the company. See Bildman Deposition Vol. I, pp. 163-165. Accordingly, Astra is not entitled to judgment as a matter of law on the ground that Bildman's taping of telephone conversations constitutes cause for his termination.

Astra next contends that Bildman was insubordinate in contacting Astra employees during the investigation in violation of the Directors' order not to do so and that this constitutes a breach of fiduciary duty justifying his termination. Whether refusal to obey an employer's order amounts to insubordination justifying termination depends on the reasonableness and importance of the order when given, the degree of discretion entrusted to or required of the employee in performing his duties, and other circumstances involved. *Mansfield v. Lang*, 293 Mass. 386, 395-398 (1936) (concluding that whether treasurer/general manager's termination for disobeying orders concerning charitable contributions and the use of credit was justified on ground of insubordination was a matter for the jury where there was evidence that the termination was a pretext); *Crabtree v. Bay State Felt Co.*, 227 Mass. 68, 70-71 (1917) (concluding that court properly refused to find, as a matter of law, that factory superintendent's refusal to appear at board of director's meeting after sufficient notice of meeting justified dismissal where there was evidence that relations between superintendent and directors were strained and that the meeting was not ordinary business conference but a pretext to subject the

superintendent to examination by company counsel). In this case, given the conflicting evidence as to whether the Board's investigation of Bildman was undertaken objectively, fairly and in good faith, this Court cannot say as a matter of law that Bildman's disobedience to the Board breached his fiduciary duty and constituted insubordination justifying termination.

Astra also argues that Bildman's refusal to cooperate with the Board's investigation following his suspension constitutes a breach of fiduciary duty justifying his termination. Case law in Massachusetts supports the proposition that, generally, an employee's refusal to cooperate with an investigation by the employer of the employee's performance of job duties is a proper ground for termination. See *Massachusetts Parole Bd. v. Civil Service Comm'n*, 47 Mass. App. Ct. 760, 765-766, rev. den., 430 Mass: 1111 (1999) (concluding that public employee was properly terminated for failing to appear at investigatory interview, despite his good faith reliance on attorney's erroneous advice that he had constitutional right not to appear); *Nuzzo v. Northwest Airlines, Inc.*, 887 F. Supp. 28, 32-33 (D. Mass. 1995) (concluding that employee was properly terminated for refusing to cooperate with employer's investigation into whether he was involved in employee credit card and mail theft); see also *McKenzie v. Brigham & Women's Hosp.*, 405 Mass. 432, 437 (1989) (under G.L.c. 151B, hospital employee's refusal to cooperate with hospital's investigation of narcotics theft was legitimate, non-discriminatory reason for employee's termination). Those cases, however, address the refusal to cooperate of an ordinary employee, as opposed to a corporation's highest ranking officer. Here again, given the conflicting evidence in the summary judgment record as to whether the investigation at issue was undertaken objectively, fairly

and in good faith or was a pretext to terminate Bildman, this Court cannot say as a matter of law that Bildman's refusal to cooperate breached his fiduciary duty and constituted cause for his termination. See *Mansfield v. Lang*, 293 Mass. at 395-398; *Crabtree v. Bay State Felt Co.*, 227 Mass. at 70-71.

Astra next contends that Bildman's use of Astra funds to pay personal legal fees, without authorization from the Board, constitutes a breach of fiduciary duty and justifies his termination. Corporate fiduciaries are bound by their duty of loyalty to subordinate their personal self-interests to the well being of the corporation and are prohibited from using the corporation for their personal benefit in a manner detrimental to the corporation. *Demoulas v. Demoulas Super Markets, Inc.*, 424 Mass. 501, 529 (1997); *Coggins v. New England Patriots Football Club, Inc*, 397 Mass. 525, 534 (1986); *Seder v. Gibbs*, 333 Mass. 445, 453 (1956). The present summary judgment record reveals a disputed factual issue as to whether charging the personal legal fees at issue to Astra U.S.A. was a benefit to which Bildman was entitled as an expatriate or within his authority and discretion as President and CEO of the company. See, e.g., 7/30/01 Bildman Affidavit; Tully Deposition, pp. 25-32, 42-43. Accordingly, Astra is not entitled to judgment as a matter of law on this basis.

Finally, Astra contends it had cause to terminate Bildman because he breached his fiduciary duty and evidenced bad faith by failing to disclose to the Board that he received, without charge, landscaping and architectural services from companies under contract with Astra, that he was a principal object of the Business Week investigation and that he had authorized the settlement of several sexual harassment

claims against him with company funds. Corporate officers have a continuing fiduciary duty of full and honest disclosure concerning all matters relevant to the company's operation. See *Mendelsohn v. Leather Manuf. Corp.*, 326 Mass. 226, 232-233 (1950); *Geller v. Allied-Lyons PLC*, 42 Mass. App. Ct. 120, 125-126 (1997). However, the summary judgment record contains material factual disputes concerning the nature of the contractor arrangements and whether they should have been disclosed and whether the sexual harassment claims and their settlement were in fact disclosed to Astra U.S.A. Board members. See, e.g., Zimmerman Affidavit; Bildman Deposition pp. 355-358; Tully Deposition, pp. 125-127; 5/11/98 Bildman Affidavit ¶¶ 12, 24-31, 34.

Therefore, Astra is not entitled to judgment as a matter of law on Count I of Bildman's counterclaim on the ground that it properly terminated Bildman for cause, thus relieving it of any further obligations to him under the Employment Agreement. Given the factual disputes concerning whether Bildman was properly terminated for cause, this Court also denies Bildman's cross-motion for summary judgment on Count I of his counterclaim insofar as it alleges breach of the Employment Agreement for failure to pay him earned compensation.

Bildman's breach of contract counterclaim is also based on Astra's refusal to pay his reasonable legal fees and expenses under Paragraph 9 of the Employment Agreement, which states: "The Company shall pay to the Employee all reasonable legal fees and expenses incurred by him in contesting or disputing any termination of this Agreement or in seeking to obtain or enforce any right or benefit provided by this Agreement." Astra contends that its termination of

Bildman for cause relieves it of any obligation to him under this provision. Paragraph 4(f) of the Employment Agreement provides that "[i]n the event of the termination of the Employee under this Paragraph, the Company shall have no further obligation to the Employee hereunder, except any obligation under any compensation or benefit plan in which the Employee is then a participant." In response, Bildman emphasizes that Paragraph 9 states that it applies to "any termination" and argues that interpreting Paragraph 4(f) to relieve Astra of its obligations in the event of a termination for cause renders the phrase "any" meaningless.

The court construes all provisions of a contract together to make it a rational business instrument and a workable and harmonious means for effectuating the parties' intent. *Starr v. Fordham*, 420 Mass. 178, 192 (1995); *J.A. Sullivan Corp. v. Commonwealth*, 397 Mass. 789, 795 (1986). An interpretation which gives reasonable meaning to all provisions of a contract is preferred to one which renders a term or provision superfluous. *Worcester Mut. Ins. Co. v. Marnell*, 398 Mass. 240, 245 (1986); *Associated Credit Serv. Inc. v. City of Worcester*, 33 Mass. App. Ct. 92, 94, rev. den., 413 Mass. 1107 (1992). In addition to termination by Astra for cause, paragraph 4 of the Employment Agreement provides for termination by the employee with or without cause, termination by Astra without cause, and termination upon change of control of the company. The term "any" in Paragraph 9 is not superfluous but rather appears to be shorthand encompassing all these termination situations. With respect to a termination by Astra for cause, however, the specific limitation of Paragraph 4(f) controls the more general language of Paragraph 9. See *Lembo v. Waters*, 1 Mass. App. Ct. 227, 233 (1973). Whether

Astra is obligated to pay Bildman fees and expenses under Paragraph 9 thus depends on whether his employment was properly terminated for cause which, as noted, is a material issue of fact to be resolved at trial. Accordingly, the cross-motions for summary judgment on Count I of Bildman's counterclaim are denied insofar as they concern breach of Paragraph 9.

II. Cross-Motions for Summary Judgment on Count II of Astra's Complaint

The parties have filed cross-motions for summary judgment on Count II of Astra's complaint, which alleges that Bildman breached his fiduciary duty and duties of good faith and loyalty to Astra. The factual disputes which precluded entry of summary judgment for Astra on Bildman's breach of contract claim necessarily preclude entry of summary judgment on this count as well.

III. Astra's Motion for Summary Judgment on Remainder of Bildman's Counterclaim and Third Party Complaint

A. Indemnification Counts

Count II of Bildman's counterclaim seeks indemnification for costs and expenses incurred in the present action, and Count III of the counterclaim seeks indemnification for costs and expenses incurred by Bildman in connection with the federal tax indictments. Bildman asserts that he is entitled to indemnification under Article IX of Astra U.S.A.'s by-laws, which provides for indemnification of officers "to the full extent permitted by New York Business Corpora-

tion Law."[9] Section 722(a) of the New York Business Corporation Law provides in relevant part:

> A corporation may indemnify any person made, or threatened to be made, a party to an action or proceeding (other than one by or in the right of the corporation to procure a judgment in its favor), whether civil or criminal . . . by reason of the fact that he . . . was a director or officer of the corporation . . . against judgments, fines, amounts paid in settlement and reasonable expenses, including attorneys' fees actually and necessarily incurred as a result of such action or proceeding, or any appeal therein, if such director or officer acted, in good faith, for a purpose which he reasonably believed to be in . . . the best interests of the corporation and, in criminal actions or proceedings, in addition, had no reasonable cause to believe that his conduct was unlawful. N.Y. Bus. Corp. §722(a) (Loislaw.com 2001).

Section 724(a) further provides that "[n]otwithstanding the failure of a corporation to provide indemnification . . . indemnification shall be awarded by a court to the extent authorized under section 722 (Authorization for indemnification of directors and officers)." N.Y. Bus. Corp. § 724(a) (Loislaw.com 2001).

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[9] Despite the voluminous summary judgment filings, it does not appear that either party produced a copy of the relevant by-law in the summary judgment record. However, in an earlier decision on the issue of indemnification, this Court (Kottmyer, J.) referred to Article IX as the relevant provision. In any event, the parties do not dispute that New York Business Corporation Law governs this issue.

Astra contends that as a matter of law § 722 does not apply to an action in which a corporation sues its own officer or director for corporate wrongdoing. It is not clear wider New York case law whether § 722 authorizes indemnification of a corporate officer in a direct suit by the corporation alleging that the officer breached his fiduciary and contractual obligations to the corporation. Although such an action is literally one "by . . . the corporation to procure a judgment in its favor" and thus arguably is excluded from § 722, the term "by or in the right of the corporation" has been interpreted as a term of art referring to derivative suits. See *Mazur*, "Indemnification of Directors in Actions Brought Directly by the Corporation," 19 J. Corp. Law 201, 208-213 (1994) (discussing the legislative history of the N.Y. indemnification statutes). Because the present suit by Astra against Bildman is direct and not derivative, Bildman contends that it falls within § 722(a). This interpretation has some support in the case law. See, e.g., *Sequa Corp. v. Gelmin*, 828 F. Supp. 203, 207 (S.D.N.Y. 1993) (stating that New York indemnification statutes apply even where officer is sued by corporation for breach of fiduciary duty to that corporation); *Oantal Corp. v. Niemuller*, 771 F. Supp. 1372, 1373-1374 (S.D.N.Y. 1991) (concluding, in action by corporation against former officer, he was not entitled to advance payment of expenses because he failed to meet statutory requirements of § 724 by showing that expenses sought were reasonable and necessary).

Nonetheless, at least one court has concluded that § 722 does not authorize indemnification of a corporate officer in a direct suit by the corporation alleging wrongful conduct by the officer in breach of his fiduciary and contractual obligations to the corporation. See *Minami Int'l Corp.*, 1992 WL 58838, * 1 (S.D.N.Y.

1992) (concluding that § 722 does not apply to direct suit by corporation against officer for breach of contractual obligations to corporation). This is consistent with the basic principle that indemnification arises where two persons are subject to a duty to a third under such circumstances that as between them, one should perfonn it rather than the other. See *Biondi v. Beekman Hill House Apartment Corp.*, 692 N.Y.S. 2d 304, 309-310 (N.Y. App. Div. 1999). Given the state of uncertainty in New York law with respect to this issue, this Court declines to grant summary judgment on the ground that § 722 does not apply to direct actions by a corporation against its former officer.

Even assuming that § 722 does applies, Astra moves for summary judgment on the ground that as a matter of law Bildman cannot prevail because indemnification under § 722 is available only if the officer or director "acted, in good faith, for a purpose which he reasonably believed to be in . . . the best interests of the corporation and, in criminal actions or proceedings, in addition, had no reasonable cause to believe that his conduct was unlawful." N.Y. Bus. Corp. § 722(a) (Loislaw.com 2001). Thus, there is no right to indemnification where the conduct at issue in the suit is not within the scope of the corporate officer's employment, undertaken for the benefit of the corporation, such that the corporation is primarily responsible for such conduct. *Kaufman v. CBS, Inc.*, 135 Misc. 2d 64, 65 (N.Y. Civ. Ct. 1987) (denying indemnification in action against officer by employee alleging verbal and physical harassment); *Professional Ins. Co. of New York v. Barry*, 303 N.Y.S. 2d 556, 559 (N.Y. Sup. 1969) (discussing an earlier version of the statute). In this case, as noted, the record reveals a dispute with respect to whether Bildman in fact breached his fiduciary duty and

engaged in misconduct outside the scope of his employment. Accordingly, Astra is not entitled to judgment as a matter of law on Counts II and III of the counterclaim insofar as they seek indemnification under New York law.

Bildman also claims a right to indemnification under Paragraph 8 of the Employment Agreement, which provides that:

> The Company agrees to indemnify the Employee in his capacity as an officer and member of the Board of Directors of the Company, all to the maximum extent permitted under the laws of the Commonwealth of Massachusetts, from and against any and all claims, damages, suits, costs, or liabilities, arising out of or relating to the performance of his duties and responsibilities as President and Chief Executive officer. The provisions of this Paragraph 8 shall survive expiration or termination of this Agreement for any reason.

Chapter 156B, section 67, which permits but does not require indemnification for corporate directors, officers and employees, provides in relevant part:

> No indemnification shall be provided for any person with respect to any matter as to which he shall have been adjudicated in any proceeding not to have acted in good faith in the reasonable belief that his action was in the best interest of the corporation . . . G.L. c. 156B, § 67 (2000).

The record reveals a factual dispute with respect to whether Bildman acted in good faith or breached his fiduciary duty and engaged in misconduct outside the scope of his employment. See, e.g., *Boston Children's Heart v. Nadal-Ginard*, 73 F.3d 429, 436438 (1st Cir. 1996) (concluding that denial of corporate officer's

claim for indemnification was proper where trial court found he was disloyal and breached his fiduciary duties to corporation). Cf. *Demoulas v. Demoulas Super Markets, Inc.*, 424 Mass. 501, 561-562 (1997) (finding corporate officer entitled to indemnification under by-laws where court failed to make an express finding that he acted in bad faith); *Dynan v. Fritz*, 400 Mass. 230, 245-246 (1987) (finding officers entitled to indemnification under corporate by-laws where court did not find that they acted in bad faith). Accordingly, Astra is not entitled to judgment as a matter of law on Counts II and III of the counterclaim insofar as they seek indemnification under Massachusetts law.

B. Defamation Counts

Astra moves for summary judgment on Counts IV, VI and VII of the counterclaim on the ground that Bildman has no reasonable expectation of demonstrating libel at trial. Count IV alleges that Astra made various defamatory statements with malice, and Count VI alleges that Astra made various defamatory statements negligently. Count VII alleges that certain statements by Astra constitute libel per se Astra contends that the statements identified by Bildman are either non-defamatory, true or privileged and that further, Bildman cannot meet his burden of showing that the defamatory statements were made with malice. To prevail on his libel claims, Bildman must demonstrate the publication by one without a privilege to do so of a false statement, of and concerning him, which ridicules him or treats him with contempt. See *Correllas v. Viveiros*, 410 Mass. 314, 319 (1991); *McAvoy v. Ruffin*, 401 Mass. 593, 597 (1988).

Count VI

Count VI of Bildman's counterclaim alleges that Astra made the defamatory statements negligently. Astra contends that Bildman is a public figure who cannot recover on such a claim. Although private persons may recover for a negligent publication of a defamatory falsehood, public figures may recover only upon proof of actual malice. *Jones v. Taibbi*, 400 Mass. 786, 797 (1987); *Stone v. Essex County Newspapers, Inc*, 367 Mass. 849, 858 (1975). One who voluntarily injects himself or is drawn into a particular public controversy becomes a public figure for a limited range of issues. See *Jones v. Taibbi*, 400 Mass. at 798; *Materia v. Huff*, 394 Mass. 328, 331 (1985). Where the relevant facts are undisputed, whether a plaintiff is a limited public figure is a question of law. *Bowman v. Heller*, 420 Mass. 517, 520, cert. den., 516 U.S. 1032 (1995); *Materia v. Huff*, 394 Mass. at 330-331.

First, the defamatory statements at issue must involve a public controversy. A public controversy is a dispute in which the outcome affects the general public or a segment of it in an appreciable way. *ELM Med. Lab., Inc. v. RKO Gen, Inc.*, 403 Mass. 779, 786 (1989). Media attention alone does not transform a private controversy into a public one. *Bowman v. Heller*, 420 Mass. at 524. Here, Bildman was at the center of a federal sexual harassment investigation of a publicly-traded pharmaceutical company employing 1,000 people in Westborough, Massachusetts. Sexual harassment in the workplace is a matter of public concern, increasingly so over the last decade. Cf. *Shaari v. Harvard Student Agencies, Inc.*, 427 Mass. 129, 133 (1998) (existence of multiple sexual harassment suits against youth hostel open to public was

matter of public concern). Accordingly, this Court concludes that there is a public controversy in this case.

Bildman's status must be determined by looking to the nature and extent of his participation in the public controversy at issue. See *Bowman v. Heller*, 420 Mass. at 522, 524. A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention. *Wolston v. Reader's Digest Ass'n Inc.*, 443 U.S. 157, 167 (1979); *Bowman v. Heller*, 420 Mass. at 525. Voluntary contact with the media will not necessarily result in the plaintiff being deemed a public figure. See *Time, Inc. v. Firestone*, 424 U.S. 448, 454 n.3 (1976). However, one who injects himself into the media limelight for the purpose of influencing the outcome of a controversy becomes a limited public figure with respect to those issues. *Gertz v. Welch*, 418 U.S. 323, 345 (1974); *Tripoli v. Boston Herald-Traveler Corp.*, 359 Mass. 150, 156 (1971).

Here, the summary judgment record reveals that Bildman, through counsel, repeatedly contacted and used the media including *Business Week*, the *Boston Globe* and the *Boston Herald* to comment on the investigation, deny and rebut Astra's allegations and influence the resolution of the investigation in the public eye. In addition, Bildman sent press releases to various media outlets including the *New York Times*, *Wall Street Journal*, Reuters, United Press, New England Cable News, CBS News and WCVB-TV, WLVI-TV and WHDH-TV in Boston. Bildman also entered into unsuccessful negotiations with CBS to be interviewed on its Evening News in New York and appeared in an interview on Swedish TV. This

undisputed evidence shows that Bildman was not merely drawn into the public controversy but also used the media limelight for the purpose of influencing the outcome of the controversy. Accordingly, I find and rule that he is a limited public figure for purposes of his defamation claims.

Where the plaintiff is a public figure, he must prove by clear and convincing evidence that the defendant published the allegedly defamatory statements with actual malice. *Milgroom v. News Group Boston, Inc.*, 412 Mass. 9, 10 (1992); *Tosti v. Ayik*, 394 Mass. 482, 491 (1985), cert. den., 484 U.S. 964 (1987). Actual malice requires a showing that the defendant published the statement with knowledge of its falsity or with reckless disregard of whether it was false; mere negligence is not enough. *Godbout v. Cousens*, 396 Mass. 254, 258 (1985); *Tosti v. Ayik*, 394 Mass. at 491. Thus, Astra is entitled to judgment as a matter of law on Count VI of Bildman's counterclaim, which alleges the negligent publication of defamatory statements.

COUNTS IV and VII

1. April 29 Speech to Astra Employees

In this speech, Johansson made the following statements:

> The first action is that Mr. Lars Bildman has been suspended and relieved of his corporate responsibilities pending the results of an investigation into allegations of improprieties within the company that occurred during his tenure as CEO. Although his future role in the Astra Group is uncertain, he will not be returning to Astra USA in any future capacity.

> The second action taken yesterday was that a committee of the Board of Directors of Astra USA has retained independent counsel to assist it in performing the investigation. The investigation is expected to take several weeks, and will include an examination of allegations of sexual harassment and other activities considered inappropriate by the company.

Astra is correct that most of these statements are non-defamatory. A statement is defamatory if, considered in the context surrounding its publication, it discredits a person in the minds of any considerable and respectable class of the community. *Draghetti v. Chmielewski*, 416 Mass. 808, 810 (1994); *Milgroom v. News Group Boston*, 412 Mass. at 12. Whether a statement is reasonably susceptible of a defamatory meaning is a threshold question of law for the court, but where a statement is susceptible of both a defamatory and a non-defamatory meaning, it is a question of fact for the jury. *Draghetti v. Chmielewski*, 416 Mass. at 811; *Foley v. Lowell Sun Publ'g Co.*, 404 Mass. 9, 11 (1989). The announcement of an employee's suspension is not in itself defamatory, regardless of any inferences which others may draw as a result. *Goldhor v. Hampshire College*, 25 Mass. App. Ct. 716, 724 (1988). See also *Ricci v. Crowley*, 333 Mass. 26, 27 (1955) (statement that public official was removed "for the good of the service" not defamatory). Cf. *Disend v. Meadowbrook Sch.*, 33 Mass. App. Ct. 674, 676 (1992) (statement that teacher terminated could be defamatory where it also stated that she had been involved in an "incident" and was "inappropriate" in dealing with children). Here, the announcement that Astra had suspended Bildman and was conducting an investigation were non-defamatory statements merely describing steps the

company had taken. Cf. *Dragheti v. Chmielewski*, 416 Mass. at 812 (employer's statement that allegations against employee had been investigated and referred to the district attorney had defamatory meaning imputing criminal conduct).

In addition, truth is an affirmative defense to a claim of defamation. *McAvoy v. Shufrin*, 401 Mass. at 597. Where the uncontroverted facts show that the allegedly libelous statements are substantially true, the defendant is entitled to judgment as a matter of law. *Milgroom v. News Group Boston, Inc.*, 412 Mass. at 12. A plaintiff who is a public figure bears the burden of demonstrating the falsity of the allegedly defamatory statement. *Shaari v. Harvard Student Agencies, Inc.*, 427 Mass. 129, 132 (1998). Here, the statements that Bildman had been suspended and that Astra was conducting an investigation were true.

The only issue is whether the statement "Although his future role in the Astra Group is uncertain, he will not be returning to Astra USA in any future capacity" is capable of a defamatory meaning. Coming so early in the investigation, it could be viewed as a decision which was made for public relations reasons without regard to whether the allegations were borne out. So viewed, it is not defamatory. However, Bildman argues that this statement implies that the allegations against him were true. This Court finds that the inference drawn by Bildman is unreasonable and that the statement is not reasonably susceptible of a defamatory meaning. Accordingly, Astra is entitled to summary judgment on the defamation counts insofar as they are based on the April 29 speech.

2. April 29 News Release & April 29 Press Release

On April 29, Astra issued a news release entitled "Astra Elects New President and CEO," which stated, among other things:

> Mr Larsson replaces Lars Bildman, who has been suspended and relived of his corporate responsibilities pending the results of an investigation into allegations of improprieties within the company that occurred during his tenure as CEO. . . .
>
> The investigation is expected to take several weeks, and will include an examination of allegations of sexual harassment and other activities considered inappropriate by the company. . . .
>
> A preliminary investigation by senior company officials resulted in the decisions announced today.

The first two paragraphs of this news/press release are true, non-defamatory statements describing action taken by Astra. The mere announcement of Bildman's suspension and an investigation are not themselves defamatory regardless of any inferences which others may draw as a result. See *Goldhor v. Hampshire College*, 25 Mass. App. Ct. at 724. Again, Bildman argues that the statement about the preliminary investigation implies evidence of wrongdoing and is thus defamatory. Although the summary judgment record reveals a dispute of fact as to whether Astra's investigation was undertaken objectively, fairly and in good faith, it is true that Astra had uncovered some evidence of wrongdoing at this point, which although perhaps not justifying termination, warranted suspension pending investigation. Assuming that the statement could reasonably be viewed as defamatory, Bildman has no reasonable

expectation of proving it to be false. Thus, Astra is entitled to summary judgment on the defamation claims insofar as they are based on the April 29, 1996 news and press releases.

3. May 3 Boston Globe Article

On May 3, the *Boston Globe* published an article entitled "Astra: CEO Allegedly Harassed Women: Says suspended Bildman also tried to cover up actions" which stated in relevant part: "Bildman told executives at Astra USA's Stockholm parent company last December that a reporter was looking into sexual harassment claims at its US subsidiary, said Benjamin Kincannon, Astra U.S.A. spokesman. But 'he downplayed it,' Kincannon said."

Astra contends that this statement is non-defamatory and constitutes Astra's opinion. Statements of pure opinion based on disclosed or assumed non-defamatory facts are constitutionally protected and are not actionable. *Friedman v. Boston Broadcasters, Inc.*, 402 Mass. 376, 379 (1988); *King v. Globe Newspaper Co.*, 400 Mass. 705, 708 (1987), *cert. den.*, 485 U.S. 962 (1988). The determination whether a statement is a factual assertion or an opinion is a question of law if the statement unambiguously constitutes either fact or opinion. *Friedman v. Boston Broadcasters, Inc.*, 402 Mass. at 379; *King v. Globe Newspaper Co.*, 400 Mass. at 709. The court examines the statement in its totality in the context in which it was published, giving weight to any cautionary terms used by the person publishing the statement, and considering all of the circumstances surrounding the statement, including the medium by which it is disseminated and the audience to which it is published. *Aldoupolis v. Globe Newspaper Co.*, 398 Mass. 731, 734 (1986); *Cole v. Westinghouse Broad. Co., Inc.*, 386

Mass. 303, 309, cert. den., 459 U.S. 1037 (1982). When a statement could reasonably be understood as either a factual assertion or an opinion, it is a question of fact for the jury to determine. *King v. Globe Newspaper Co.*, 400 Mass. at 709.

Where the meaning of statements is imprecise and open to speculation, and the statements are incapable of being proved true or false, they cannot be characterized as assertions of fact. *Cole v. Westinghouse Broad. Co., Inc.*, 386 Mass. at 312 (statements that a reporter was "sloppy and irresponsible" with "bad techniques" could not be proved false and could not reasonably be viewed as factual assertions). Bildman contends that Kincannon's statement is defamatory because it suggests that he lied about his involvement in sexual harassment. However, the word "downplayed" is imprecise and open to numerous interpretations and would be extremely difficult to prove true or false. Accordingly, Kincannon's statement can only reasonably be viewed as Astra's opinion or interpretation of Bildman's response and is not actionable. Astra is therefore entitled to summary judgment on the defamation counts insofar as they are based on the May 3 Boston Globe article.

4. May 13, 1996 Mogren Address

On May 13, 1996, Mogren addressed Astra's Annual Meeting on the issue of "Improprieties at Astra USA, Inc." and stated: "the CEO and two colleagues of the American subsidiary were suspended." This statement is simply a true, non-defamatory statement describing action taken by Astra and cannot form the basis of Bildman's libel claim. See *Goldhor v. Hampshire College*, 25 Mass. App. Ct. at 724.

Mogren also stated:

> But as a result of preliminary investigation at the end of April, we were able to confirm that a violation had been made of the fundamental principles for working at Astra and of the culture that we have developed in the Group as a whole . . . .
>
> Concerning the sexual harassment now in question, it should be said that what has occurred is at best a violation of good style and form. At worst, a number of our employees have also been caused inconveniences or suffering. To the extent this may have occurred, we are deeply regretful. We will do everything we can to prevent it from ever happening again. . . .
>
> As soon as we in Astra's corporate management, through our preliminary investigation, were practically certain that something serious had happened, we swiftly set in a number of measures.
>
> What has happened is that some people have tried to put themselves above the rules, at the same time that they have made great efforts to cover up what has happened.

Astra argues that these statements are non-defamatory. These statements are reasonably susceptible of a defamatory meaning because they suggest wrongdoing by Bildman including inappropriate behavior toward employees, violation of company rules and deceit. Cf. *DelloRusso v. Montiero*, 47 Mass. App. Ct. 475, 476 (1999) (statement that employee's work habits were inconsistent with employer's standards was defamatory). This would at least appear to be a

question for a jury. See *Draghetti v. Chmielewski*, 416 Mass. at 811.

Astra also argues that these statements are non-actionable opinion. Mogren's statements that "a violation had been made of the fundamental principles for working at Astra and of the culture that we have developed in the Group as a whole" and that "what has occurred is at best a violation of good style and form" are too imprecise and subjective to be characterized as assertions of fact. See *Cole v. Westinghouse Broad. Co., Inc.*, 386 Mass. at 312. These statements are not easily capable of being proved true or false.

However, the statement that "what has happened is that some people have tried to put themselves above the rules, at the same time that they have made great efforts to cover up what has happened" can reasonably be viewed as a factual assertion that Bildman abused his authority and engaged in deceit. Even if deemed to be Astra's opinion, a statement cast in the form of opinion is actionable if it implies the existence of undisclosed defamatory facts on which the opinion purports to be based. *Friedman v. Boston Broadcasters, Inc.*, 402 Mass. at 380; *King v. Globe Newspaper Co.*, 400 Mass. at 713. Cf. *Judd v. McCormack*, 27 Mass. App. Ct. 167, 175 (1989) (employer's statement that firefighter lacked necessary psychological and physical skills to perform effectively was non-actionable opinion where letter set forth specific facts on which that conclusion was based); *Petsch-Schmid v. Boston Edison Co.*, 914 F. Supp. 697, 705 (D. Mass. 1996) (employer's statement that employee was unprofessional and had performance problems was protected opinion where its basis was disclosed). To the extent that the "cover up"

statement is interpreted as Astra's opinion, it implies that the company has undisclosed defamatory facts to support it. Finally, although Astra contends that this statement is true, the summary judgment record reveals a dispute as to the truth of these matters.

Astra further argues that Mogren was privileged to make these statements at Astra's annual meeting. An employer has a conditional privilege to disclose defamatory information concerning an employee where the publication is reasonably necessary to protect or further the employer's legitimate business interest. See *Foley v. Polaroid Corp.*, 400 Mass. 82, 95 (1987); *Bratt v. International Bus. Mach. Corp.*, 392 Mass. 508, 509 (1984). There is also a conditional privilege when the publisher of a statement and its recipient have a common interest in the subject and the statement furthers that interest. *McCone v. New England Tel. & Tel. Co.*, 393 Mass. 231, 235 (1984); *Humphrey v. National Semiconductor Corp.*, 18 Mass. App. Ct. 132, 133, *rev. den.*, 393 Mass. 1102 (1984). These conditional privileges are ones of publication to the narrow class of people who share a legitimate interest in the publication. *Draghetti v. Chmielewski*, 416 Mass. at 813-814.

Here, Mogren had a privilege to discuss the allegations and investigation into possible illegal behavior and corporate wrongdoing internally within the company. *Bratt v. International Bus. Mach. Corp.*, 392 Mass. at 513-515. *Compare Draghetti v. Chmielewski*, 416 Mass. at 814 (no privilege for police chief to publish to news reporter statements concerning evidence of wrongdoing in investigation against officer).

Once the defendant meets its burden of showing the existence of a privilege, the burden shifts to the

plaintiffto show abuse of the privilege. *McCone v. New England Tel. & Tel. Co.*, 393 Mass. at 236; *Judd v. McCormack*, 27 Mass. App. Ct. 167, 173 (1989). A conditional privilege immunizes the defendant from liability unless he acted with actual malice or acted recklessly by unnecessary, unreasonable or excessive publication. *Milgrew v. Taunton*, 410 Mass. 631, 635 (1991); *Bratt v. International Bus. Mach. Corp.*, 392 Mass. at 509; *Humphrey v. National Semiconductor Corp.*, 18 Mass. App. Ct. at 134. With respect to a conditional privilege, actual malice may be shown by evidence that the defendant had an improper motive in publishing the statement, acted with ill will toward the plaintiff or abused the privileged occasion as a pretense. *Ezekiel v. Jones Motor Co., Inc.*, 374 Mass. 382, 390-391 (1978); *Gindall v. First Nat'l Stores, Inc.*, 330 Mass. 557, 559 (1953); *Judd v. McCormack*, 27 Mass. App. Ct. 167, 175 (1989). There is a dispute in the summary judgment record as to whether Astra's investigation was undertaken objectively, fairly and in good faith, or whether it was fueled by an ulterior motive to oust Bildman from the company. Cf. *Arsenault v. Allegheny Airlines, Inc.*, 485 F. Supp. 1373, 1380 -1381 (D. Mass. 1980), aff'd, 636 F.2d 1199 (1st Cir. 1980), cert. den., 454 U.S. 821 (1981) (employer entitled to judgment as matter of law with respect to accusation that employee committed crime where record was abundantly clear that employer made good faith, thorough investigation). Thus, there is an issue of fact with respect to whether Mogren made the statement with malice so as to deprive Astra of its conditional privilege.

Nonetheless, because Bildman is a public figure, he must meet a higher standard of malice in order to defeat summary judgment. Improper motive or ill will is not sufficient to demonstrate malice in the

constitutional sense. *Rotkiewicz v. Sadowsky*, 431 Mass. 748, 755 (2000); *Tosti v. Ayik*, 394 Mass. 482, 491 (1985); *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 866 (1975); *Pacella v. Milford Radio Corp.*, 18 Mass. App. Ct. 6, 16 (1984). Actual malice in the constitutional sense requires proof that the defendant published the statement with knowledge of its falsity or with reckless disregard of whether it was false. *Godbout v. Cousens*, 396 Mass. at 258; *Tosti v. Ayik*, 394 Mass. at 491. The issue is the defendant's attitude toward truth or falsity and not his attitude toward the plaintiff. *Rotkiewicz v. Sadowsky*, 431 Mass. at 755.

To prove reckless disregard, there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. *Milgroom v. News Group Boston, Inc.*, 412 Mass. at 11; *Tosti v. Ayik*, 394 Mass. at 491. For example, actual malice may in some circumstances be shown by evidence that the defendant published a statement without investigation or verification and with knowledge that the only information he had was hearsay. See *King v. Globe Newspaper Co.*, 400 Mass. at 721-722. Malice may also be inferred where there are obvious reasons to doubt the veracity of an informant relied upon or the accuracy of his reports. *Id.* at 722; *Lyons v. New Mass. Media, Inc.*, 390 Mass. 51, 57 (1983). Actual malice involves a subjective test; however, because it would be rare for a defendant to admit having doubts about his publication, the jury is entitled to draw inferences as to the defendant's state of mind from the objective evidence. *McAvoy v. Shufrin*, 401 Mass. at 599; *Tosti v. Ayik*, 394 Mass. at 492.

Bildman has not identified specific evidence in the summary judgment record which raises a dispute as to whether Astra subjectively knew of the falsity or seriously doubted the truth of its statement that he put himself above the rules and tried to cover up his actions. Similarly, Bildman has failed to identify facts in the record to show that Astra subjectively knew of the falsity or recklessly disregarded the truth of its statement that management, through its preliminary investigation, was practically certain that something serious had happened. Although there is a dispute as to the truth of the statements, mere falsity is not enough to establish malice. *Roketenetz v. Woburn Daily Travel, Inc.*, 1 Mass. App. Ct. 156, 161 (1973); *Bose Corp. v. Consumers Union of U.S., Inc.*, 84 F.R.D. 682, 685 (D. Mass. 1980). Bildman has no reasonable expectation of demonstrating by clear and convincing evidence that Astra acted with malice so as to incur liability to a public figure. Accordingly, Astra is entitled to summary judgment on the defamation claims based on Mogren's May 13 address.

5. May 3, 1996 Wail Street Journal Article

On May 3, 1996, the *Wall Street Journal* published an article entitled "Astra USA Investigates Alleged Misuse of its Funds by Suspended CEO, Others" which stated in relevant part: "[Astra spokesman] Mr. Kincannon said that Astra AB officials grew concerned when Mr. Bildman was not forthcoming' to them in handling inquiries from *Business Week* magazine about possible sexual harassment at Astra USA. 'He assured them that nothing was wrong,' Mr. Kincannon said."

Again, Astra argues that this statement is non-defamatory opinion and that it is privileged. The statement that Bildman was not forthcoming can

reasonably be viewed as a factual assertion that he was deceitful and had something to hide. Also, to the extent that this statement is interpreted as Astra's opinion, it implies that the company has undisclosed defamatory facts to support it. Although Astra contends that this statement is true, the summary judgment record reveals a dispute as to whether or not Bildman kept Astra informed during the investigation.

Although Astra claims it was conditionally privileged to make its statement, the privilege is one of publication to a narrow class of people who share a legitimate interest in the publication. See *Draghetti v. Chmielewski*, 416 Mass. at 813-814. It is debatable whether publication of this information to the media was reasonably necessary to protect or further Astra's legitimate business interest or whether the public has a common interest with Astra in the subject which was furthered. See *Id.* (no privilege for police chief to publish to news reporter statements concerning evidence of wrongdoing in investigation of officer).[10] Assuming that Astra was privileged, as discussed above, there would be an issue of fact with respect to whether Astra acted with malice toward Bildman so as to deprive it of any conditional privilege.

However, insofar as Bildman is a public figure, he must show actual malice in the constitutional sense

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[10] Astra cites numerous cases from other jurisdictions which have held that a company's publication to the media of information concerning wrongdoing by an employee is within the conditional privilege. See, e.g., *Richmond v. South Wire Co.*, 980 F.2d 518 (8th Cir. 1992); *Straitwell v. National Steel Corp.*, 869 F.2d 248 (4th Cir. 1989); *Gallo v. Princeton Univ.*, 656 A.2d 1267 (NJ. App. Div.), rev. den., 663 A.2d 1359 (N.J. 1995).

which is not merely ill will or ulterior motive, but knowledge of falsity or reckless disregard of truth. See *Rotkiewicz v. Sadowsky*, 431 Mass. at 755; *Pacella v. Milford Radio Corp.*, 18 Mass. App. Ct. at 16. Bildman has not identified specific evidence in the summary judgment record which raises a factual dispute as to whether Astra subjectively knew of the falsity or had serious doubt about the truth of the statement that Bildman was not forthcoming in the investigation. He has no reasonable expectation of demonstrating by clear and convincing evidence that Astra acted with malice so as to incur liability to a public figure. Astra is therefore entitled to summary judgment on the defamation claims insofar as based on the May 3 Wall Street Journal article.

6. May 13 Business Week Article

On May 13, *Business Week* published an article by Maremont entitled "Abuse of Power: the astonishing tale of sexual harassment at Astra's U.S. pharmaceutical subsidiary" which contained the following statements, among others:

> On April 29 as *Business Week* was about to publish the results of a six-month investigation into allegations of rampant sexual harassment at Astra, Bildman was suspended and relieved of his responsibilities by Astra's parent, giant Swedish drug-maker Astra AB. . . .
>
> Senior Astra executives acknowledged that *Business Week*'s investigation sparked the abrupt action. Although Bildman had told superiors about the investigation months ago, Carl-Gustaf Johansson, a member of Swedish Astra's executive committee, says the company was unaware of the full scope of the allegations until it

> received a lengthy letter from *Business Week* on April 19. "We hadn't heard anything this detailed—and certainly not that Mr. Bildman himself was the focus" of some allegations, says Johansson. Refusing further comment on Astra's own preliminary inquiries—which also now include allegations of minor financial improprieties by Bildman—Johansson says Astra suspended its U.S. CEO because "we lost some trust in him."

Astra contends that these statements are non-defamatory, true and privileged. Assuming that the first statement is susceptible of a defamatory meaning, it is true and therefore cannot be the basis of a libel claim. Because Bildman has no reasonable expectation of demonstrating that the statement that Astra "lost trust in him" is false, he cannot base a claim of libel thereon.

The statements that the company was unaware of the extent of the allegations and Bildman's involvement are susceptible of a defamatory meaning in that they imply that Bildman misled the company. Although Astra contends that these statements are true, there is a factual dispute concerning exactly when Astra knew of Bildman's involvement.

Again, although there is an issue of fact with respect to whether Astra acted with ill will toward Bildman so as to deprive it of any conditional privilege, Bildman must meet the higher standard applicable to a public figure. Bildman has not identified specific evidence in the summary judgment record which raises a dispute as to whether Astra subjectively knew of the falsity or seriously doubted the truth of its statement it was unaware of the scope of the allegations until April 19. Although there is a dispute as to the truth of the statements, mere falsity

is not enough to establish malice. *Roketenetz v. Woburn Daily Travel. Inc.*, 1 Mass. App. Ct. at 161; *Bose Corp. v. Consumers Union of U.S., Inc.*, 84 F.R.D. at 685. Bildman has no reasonable expectation of demonstrating by clear and convincing evidence that Astra acted with malice so as to incur liability to a public figure. Astra is therefore entitled to summary judgment on the defamation claims insofar as based on the May 13 *Business Week* article.

7. May 24 Boston Globe Article & May 24 Boston Herald Article

On May 24, 1996, the *Boston Globe* published an article entitled "Astra AB's chief says Bildman won't be back," which stated in relevant part:

> Astra AB Chief Executive Håkan Mogren said Lars Bildman, the suspended chief executive of the company's scandal-plagued U.S. unit in Westboro, will not return to the position he had occupied for the past 15 years.
>
> "It would be impossible to have him back in that job. How could people work together and create a good atmosphere?," Mogren said in New York.

Also on May 24, the *Boston Herald* published an article entitled "Suspended Astra Exec Won't Return," which contained identical statements.

The statement that Bildman would not be returning as CEO is a true, non-defamatory describing action taken by Astra. The mere announcement of an employee's termination is not itself defamatory regardless of any inferences which others may draw as a result. See *Goldhor v. Hampshire College*, 25 Mass. App. Ct. at 724. Further, Mogren's statement

that it would be impossible for Bildman to return is so subjective and incapable of being proved true or false that it can only reasonably be viewed as his opinion. Accordingly, Astra is entitled to summary judgment on the defamation claims insofar as they are based on the May 24 *Boston Globe* and *Boston Herald* articles.

8. May 1996 CBS Appearance

In May of 1996, Kincannon appeared on a CBS News "Eye on the Nation" segment concerning the allegations of sexual harassment at Astra U.S.A. When asked whether Bildman would return to Astra U.S.A., Kincannon replied that he would not. Kincannon based this response on newspaper reports that according to Mogren, Bildman would not be returning. Kincannon's statement that Bildman would not be returning was a true statement of fact which cannot be the basis of a libel claim. Astra is therefore entitled to summary judgment on the defamation claims insofar as they are based on Kincannon's May 1996 CBS Appearance.

9. February 4, 1998 Settlement Announcement & February 5 Press Release

On February 4, 1998 Ivan Rowley, President of Astra U.S.A., announced a settlement with the E.E.O.C. of sexual harassment charges against the company, stating in relevant part:

> In May, 1996, the Equal Employment Opportunity Commission initiated its investigation into allegations of sexual harassment at Astra USA. Before that, Astra had begun its own internal investigation and had suspended the CEO and two other senior executives. Astra took these actions immediately after learning of the allegations.

> Astra's cooperation with the EEOC investigation was a natural extension of Astra's own investigation and other steps already taken by the company. Our cooperation was based on a common desire with the EEOC to get at the truth and rectify what ever damage had been done to current and former Astra employees.

On February 5, 1998, Astra U.S.A. issued a press release containing identical statements.

Whether a statement is reasonably susceptible of a defamatory meaning is a threshold question of law. *Foley v. Lowell Sun Publ'g Co.*, 404 Mass. at 11. The statements in the settlement announcement identified by Bildman cannot reasonably be viewed as discrediting him in the minds of any considerable and respectable class of the community. Further, the statements are either true or incapable of being proved false. Astra is entitled to summary judgment on the defamation claims insofar as they are based on the February 4 Settlement Announcement and February 5 press release.

10. February 5 Middlesex News Article

The *Middlesex News* published an article on February 5 entitled "Astra Settles Federal Harassment Suit: Record Setting Deal Ends EEOC Probe" which reported Astra's filing of a lawsuit against Bildman and stated, "Kincannon said that the rest of the damages would cover legal costs, including the cost of an internal investigation in early 1996. Astra's lawsuit also demands that Bildman repay the company for any fines and settlements from the EEOC investigation."

These statements are true statements of fact which simply describe what Astra seeks to recover as dam-

ages in its lawsuit. They are not reasonably susceptible of a defamatory meaning. Astra is entitled to summary judgment on defamation claims insofar as they are based on the February 5 *Middlesex News* Article.

11. February 5 Boston Globe Article

Also on February 5, the *Boston Globe* published an article entitled "$10M Astra Settlement is Expected," which stated in relevant part:

> A federal agency is expected today to announce that Astra USA Inc. agreed to pay $10 million to settle allegations of sexual harassment and attempts to cover it up during the scandalous tenure of ousted chief executive Lars Bildman. . . .
>
> Astra USA said it wants "any amounts paid as a result of the investigation" by EEOC.
>
> Sources familiar with the negotiations put the settlement at $10 million. . . .
>
> "His actions—asking people to destroy records and the like—are in our estimation an attempt to cover up and keep things from his superiors in the company," Astra USA's spokesman, Benjamin Kincannon, said yesterday.

The first statement identified by Bildman does not appear to be attributable to Astra. In any event, it is a true non-defamatory statement. Cf. *Perry v. E. Anthony & Sons, Inc.*, 353 Mass. 112, 114 (1967) (accurate report that plaintiff had settled her lawsuit for $1 not capable of defamatory meaning, even if she claimed it implied suit lacked merit). The second statement is a true statement describing what Astra seeks to recover as damages in its lawsuit and is not reasonably susceptible of a defamatory meaning. The

third statement, to the extent it can be attributed to Astra, is a true non-defamatory statement.

The statement that Bildman destroyed records in an attempt to cover up his actions is susceptible of a defamatory meaning. Although Astra claims truth as a defense, the summary judgment record reveals a factual dispute as to whether Bildman destroyed records and engaged in a cover up. Assuming this statement was conditionally privileged as necessary to protect a legitimate business interest, an issue of fact exists as to whether Astra acted with ill will toward Bildman so as to deprive it of any conditional privilege

However, insofar as Bildman is a public figure, he must show actual malice in the constitutional sense which is not merely ill will or ulterior motive, but knowledge of falsity or reckless disregard of truth. See *Rotkiewicz v. Sadowsky*, 431 Mass. at 755; *Pacella v. Milford Radio Corp.*, 18 Mass. App. Ct. at 16. Bildman has not identified specific evidence in the summary judgment record which raises a factual dispute as to whether Astra subjectively knew of the falsity or recklessly disregarded the truth of the statement that Bildman destroyed records in an attempt to cover up his wrongdoing. Administrative Assistant Lucy Tapper told investigators that in April of 1996, during the investigation and before Badman's suspension, Bildman asked her to come into the office on a Sunday to look for files relating to AMI and personal files that would help him with his taxes, such as expense documents relating to his house. While she was there, she observed that Bildman spent the entire day shredding documents and loading files into the trunk of his car. (Ex. H to Carling Aff. pp. 22-28). Tapper did not know the

content of the shredded documents or removed files. (Ex. H. to Carling Aff. p. 26). Karen Hanna told investigators that in the beginning of April, Bildman asked her to remove from his office binders containing his expense account reports and register. (Ex. B to Carling Aff. pp. 2-7). The following week, when Hanna was looking for the AMI files, she could not find them and Bildman told her that he and Lars Magnusson had removed them. (Ex. B to Carling Aff p. 9).

Paralegal Mary Natale told investigators that on April 10 a computer person named Roger came to the offsite office and was instructed to take everything off the C drive of the computers. (Ex. F to Carling Aff. p. 20). Roger Legendre, head of Astra's information technology unit, was asked by Magnusson to erase the computer drives at the off-site office. (Legendre Dep., p. 65). He found no files on the computers and so did not erase anything. (Legendre Dep., pp. 66-67). On April 23, Bildman called Magnusson in the off-site office, after which Magnusson told Natale and two other employees to pack up everything in the office including records, documents and computer disks and anything bearing the Astra name. (Ex. F. to Carling Aff. pp. 13-16). The items were packed into boxes and placed in Magnusson's car. (Ex. F. to Carling Aff. p. 17).

There is no evidence that the testimony of these employees was obviously unreliable and the evidence as a whole does not allow an inference that Astra should have had serious doubt as to the truth of its conclusion that Bildman was covering up his actions. Bildman has no reasonable expectation of demonstrating by clear and convincing evidence that Astra acted with malice so as to incur liability to a public figure. Astra is entitled to summary judgment on the

defamation claims insofar as they are based on the February 5 *Boston Globe* Article.

12. February 6 Boston Herald Article

On February 6, 1998, the *Boston Herald* published an article entitled "Astra-Nomical: firm settles sex harass claims for $9.85 Million," which also referred to Astra's civil suit stating, "Astra admitted the suit is partly an effort to stick the former CEO with the bill for EEOC settlement." This statement is not reasonably susceptible of a defamatory meaning; indeed, insofar as it uses the word "stick" it suggests Astra is doing something negative. Astra is therefore entitled to summary judgment on the defamation claims insofar as they are based on the February 6 *Boston Herald* article.

13. June 26, 1996 News Release & Press Release

On June 26, 1996, Astra AB issued a news release which stated in relevant part:

> Astra USA today announced the termination of Lars 'Wotan, the former President and CEO of the company. Bildman had been suspended on April 28, 1996 pending the results of an investigation into improprieties within the company that occurred during his tenure as CEO. . . .
>
> Bildman's termination was announced at a press conference at which Astra officials commented on the investigation by the company into allegations of sexual harassment, financial improprieties, and other activities considered inappropriate by the company.
>
> "Our investigation uncovered management behavior under Mr. Bildman that is unacceptable to Astra," said Executive Vice President C.G.

> Johansson of Astra AB, who headed the investigating committee established by the Board of Astra USA. . . .
>
> Bildman chose not to cooperate with the investigation.
>
> The investigation showed evidence of a variety of improper activities, including misuse of company funds, inappropriate behavior at company functions, disregard of established company rules and procedures, and a neglect by Mr. Bildman to keep the parent company informed of these problems at its subsidiary.
>
> There is evidence that Mr. Bildman used company funds for personal expenses, including renovations to his houses and vacations. Approximately $2 million was involved. . . .
>
> According to Astra's investigation, Bildman attempted to deflect attention away from himself by claiming that enemies of the company were behind the media's scrutiny of Astra USA and himself. There is no evidence to support this.
>
> Astra's investigation did show that Mr. Bildman went to great lengths to keep his behavior secret from the superiors in the Astra Group. He rented office space offsite for the purpose of keeping information from the parent company. . . .

Astra also issued a press release on June 26 containing identical statements.

The first two statements identified by Bildman are true, non-defamatory statements describing action taken by Astra. The mere announcement of an employee's termination is not itself defamatory regardless of any inferences which others may draw

as a result. See *Goldhor v. Hampshire Coll.*, 25 Mass. App. Ct. at 724. The statement that Bildman did not cooperate with the investigation is substantially true in that he refused to directly answer any questions posed to him by the investigators and thus cannot form the basis of a defamation claim.

Astra contends that the remaining statements are non-defamatory and true because they are qualified by terms such as "the investigation showed" or "there was evidence that." However, Astra is not necessarily immunized from liability by use of such qualifiers where there are factual disputes as to whether Bildman committed the wrongdoing the investigation purportedly uncovered and Astra's statements may in fact have given the public a false impression of the strength of the evidence uncovered. There are factual disputes in the record with respect to whether Bildman's use of company funds for home renovations and vacations was in fact improper, whether he adequately reported his activities to the company, whether he fabricated a conspiracy scheme to deflect attention from his activities and whether he used an offsite office to cover up his activities. Therefore, this Court cannot say as a matter of law that the statements are non-defamatory or substantially true.

Again, although there is an issue of fact with respect to whether Astra acted with ill will toward Bildman so as to deprive it of any conditional privilege, Bildman must meet the higher standard applicable to a public figure: knowledge of falsity or serious doubt as to the truth of the statements. Bildman has not identified any evidence in the summary judgment record suggesting that Astra knew that its statements concerning his use of company funds, inappropriate behavior, disregard of

rules and reporting of his activities to the company were false or that it had serious doubts about the truth of such statements. Although the record appears to reveal factual disputes as to whether Bildman did in fact commit such wrongdoing, falsity of statements alone is not enough to show malice. See *Roketenetz v. Woburn Daily Travel, Inc.*, 1 Mass. App. Ct. at 161.

With respect to the statement that no evidence supported Bildman's "enemies of the company" theory, Bildman points to the following to support his contention that Astra knew that a competing pharmaceutical company, Astra-Merck, Inc. (AMI), might be behind the *Business Week* article. In January of 1996, the task force headed by Bildnian gave Mogren a "Situation Analysis" memorandum stating that they were trying to determine whether the lead for the *Business Week* story was provided by competitor AMI and detailing possible connections between AMI's President and individuals at *Business Week*. (Ex. 5 to Joy Dep. in Bildman Supp.) In April of 1996, Leonard DeCof, a member of Bildman's task force, met in Sweden with Mogren and Johannson. (DeCof Dep., p. 76). DeCof told Mogren that Astra investigator Nezer had information that AMI had hired Kroll Associates to do a massive investigation of Astra and that it might be a routine investigation by a competitor in preparation for merger negotiations or it might be for the purpose of tarnishing the company with the *Business Week* article to "soften" Astra for a takeover. (DeCof Dep., pp. 83-84). Mogren said that he did not think there was a real threat from Merck and Bildman was paranoid. (DeCof Dep., p. 84; Exhibits to DeCof Dep.).

Astra attorneys Yon and Culbert, both members of the task force, did not believe AMI was behind the *Business Week* story and told Bildman so. (Yon Dep., p. 44). DeCof, who was involved in investigating the AMI theory, ultimately concluded and told Mogren that *Business Week* reporter Maremont was honest and just looking for a story. (DeCof Dep., pp. 54-55). According to DeCof, he did not form the conclusion that AMI's President had any special relationship with *Business Week*. (DeCof Dep., p. 57).

That Mogren and Astra knew that the AMI theory was being actively investigated but did not credit it does not establish that the statements, "According to Astra's investigation, Bildman attempted to deflect attention away from himself by claiming that enemies of the company were behind the media's scrutiny of Astra USA and himself. There is no evidence to support this." were knowingly false or that Astra seriously doubted their truth. The summary judgment record suggests that Bildman was the first one to raise this theory and that he directed others on the task force to pursue it aggressively. Bildman has not pointed to any evidence that AMI was in fact behind the *Business Week* article; rather, he argues that Astra's statement unnecessarily implies that his advocacy of the theory was deceptive. This Court concludes that Bildman has no reasonable expectation of establishing malice with respect to the "enemies of the company" statement.

With respect to the statement concerning Bildman's use of the offsite facility, Bildman points to Yon's testimony that he told investigators that it was set up at DeCof's request so he could have space to keep files and so that Lars Magnusson could have additional work space. (Yon Dep., pp. 128-129).

However, Astra had evidence that following a call from Bildman to Magnusson during the investigation, the offsite facility was cleaned out, documents were removed and computer hard drives erased. (Clauss Dep., p. 34). That Astra may have known that it was not originally Bildman's idea to rent the offsite space is not enough to establish by clear and convincing evidence that its statement "Astra's investigation did show that Mr. Bildman went to great lengths to keep his behavior secret from the superiors in the Astra Group. He rented office space offsite for the purpose of keeping information from the parent company?' was made with knowledge of falsity or serious doubt as to truth. Bildman has no reasonable expectation of demonstrating by clear and convincing evidence that Astra acted with malice so as to incur liability to a public figure. Accordingly, Astra is entitled to summary judgment on the defamation claims insofar as they are based on the June 26 news release.

14. June 26 Press Conference

At a press conference on June 26, Johansson stated in relevant part:

> In December, Mr. Bildman informed me that a journalist was making inquiries about Astra USA that included questions about alleged sexual harassment at the company. Mr. Bildman assured me that there was nothing to worry about. He also did not mention that he himself was a focal point of the inquiries.
>
> Mr. Bildman was asked on a number of occasions after that whether any of the allegations involved him. He was also asked whether Astra USA had anything to be ashamed of. He said no.

On April 19, we received in Sweden a letter from *Business Week*. . . . We were shocked by what we read.

Mr. Bildman refused to cooperate with the investigation. . . .

Mr. Bildman was terminated because he violated the trust that had been placed in him by the Astra Group. His style of leadership was unacceptable. And certain of his actions were unprofessional and hurtful to the morale of the employees.

Our investigation also found that Mr. Bildman exhibited inappropriate behavior at company functions, primarily internal sales meetings held off company premises.

There is evidence that Mr. Bildman used company funds for personal expenses, including renovations to his houses and vacations. Approximately $2 million was involved. . . .

Our investigation also showed that Mr. Bildman went to great lengths to keep his behavior secret from his superiors in the Astra Group. He rented office space offsite for the purpose of keeping information from the parent company.

According to our investigation, Bildman attempted to deflect attention away from himself by claiming that enemies of the company were behind the media's scrutiny of Astra USA and himself. There is no evidence to support this.

In all of these activities, Mr. Bildman displayed a disregard for both established rules and procedures of the Astra Group and for the high ethical principles that are implicit in our corporate culture. . . .

> Because of the unprofessional actions of one person in one of our 45 subsidiaries, the Astra name has become associated with activities that are the complete opposite of the high ethical and moral principles for which we have been known for over eight decades. . . .
>
> But there is no doubt that Lars Bildman abused his power as President of Astra U.S.A. Our investigation uncovered management behavior under Mr. Bildman that is unacceptable to Astra. . . .
>
> This is the end of an unfortunate and distasteful chapter in the history of Astra U.S.A.

Contrary to Astra's assertions, these statements are reasonably susceptible of a defamatory meaning. The final statement is clearly one of opinion, since the terms "unfortunate" and "distasteful" are imprecise and open to numerous interpretations, and would be difficult to prove true or false. However, the remainder of the statements at issue are reasonably interpreted as assertions of fact. Again, the summary judgment record reveals factual disputes with respect to whether the statements are substantially true.

Except for the statements concerning enemies of the company and use of the offsite office, which are discussed above, Bildman has not identified specific evidence in the summary judgment record which raises a factual dispute as to whether Astra subjectively knew of the falsity or had serious doubt about the truth of these statements. He has no reasonable expectation of demonstrating by clear and convincing evidence that Astra acted with malice so as to incur liability to a public figure. Accordingly, Astra is entitled to summary judgment on the defamation claims insofar as they are based on the June 26 press conference.

Finally, Bildman contends that summary judgment must be denied under a theory of "defamation by conduct." He argues that Astra's suspension of him just before the *Business Week* article was published is defamatory. Several jurisdictions have recognized that conduct may be actionable as defamatory where it rises to the level of "dramatic pantomime"—an interplay of conduct and words that provides a clearly discernible account of a false statement about the plaintiff. See *Bolton v. Department of Human Serv.*, 540 N.W. 2d 523, 525 (Minn. 1995) (declining to recognize such a cause of action but noting that Alaska, North Dakota, Pennsylvania and Wisconsin allow defamation by conduct). The only case cited by Bildman in support of his assertion that Massachusetts recognizes defamation by conduct is *Petsch-Schmid v. Boston Edison Co.*, 914 F. Supp. 697, 705 (D. Mass. 1996) (denying summary judgment on employee's claim that she was defamed when after terminating her, employer escorted her from building while speaking to her in a loud, demeaning voice). I decline to recognize a theory of defamation by conduct here. The fact that Astra suspended Bildman right before the release of the *Business Week* article adds nothing to his defamation claim. For all the reasons discussed above, Astra is entitled to summary judgment on Counts IV and VII of Bildman's counterclaim.

IV. Individual Defendants' Motion for Summary Judgment on Bildman's Complaint in Action No. 99-1942

A. Intentional Interference with Contract

Count I of Bildman's complaint alleges that Mogren and Johansson intentionally interfered with his contract of employment with Astra U.S.A. by voting to suspend him and ultimately to terminate his

position as CEO and President. The defendants move for summary judgment on the ground that Bildman has no reasonable expectation of establishing such a claim at trial. A plaintiff alleging interference with contract must demonstrate that he had a contract with a third party; the defendants intentionally and knowingly induced the third party to break that contract; the defendants' interference was improper in means or motive, and the plaintiff was harmed by the defendants' actions. *Harrison v. NetCentric Corp.*, 433 Mass. 465, 476 (2001); *Wright v. Shriners Hosp. for Crippled Children*, 412 Mass. 469, 476 (1992). Where a plaintiff alleges intentional interference with his employment by an individual officer of the employer acting within his supervisory responsibilities, the plaintiff must demonstrate that the official acted with actual malice: a spiteful, malignant purpose unrelated to the legitimate corporate interest. *Weber v. Community Teamwork, Inc.*, 434 Mass. 761, 781-782 (2001); *Shea v. Emmanuel College*, 425 Mass. 761, 764 (1997); *Wright v. Shriners Hosp. for Crippled Children*, 412 Mass. at 476. The plaintiff must show facts giving rise to a rational inference of probability that spite or ill will was the controlling factor in the alleged interference. *Weber v. Community Teamwork, Inc*, 434 Mass. at 781; *Gram v. Liberty Mut. Ins. Co.*, 384 Mass. 659, 663 (1981); *Alba v. Sampson*, 44 Mass. App. Ct. 311, 315, *rev. den.*, 427 Mass. 1104 (1998).

Bildman contends that he is not required to show that Mogren and Johansson acted with actual malice because they were not acting in the scope of their employment as corporate officials when they voted to suspend and later terminate him. To support this proposition, Bildman points to evidence that Mogren and Johansson had begun investigating the allegations of sexual harassment against him before the

April 28, 1996 Board meeting at which he was suspended. The fact that Mogren and Johansson were involved in a preliminary investigation two weeks before the Board formally established an investigative committee does not demonstrate that their votes to suspend and ultimately terminate Bildman's employment occurred outside the course of their corporate duties as directors. Bildman therefore must demonstrate actual malice in order to prevail on his interference with contract claims.

As evidence of malice, Bildman contends that Johansson lacked sufficient evidence of wrongdoing to justify his vote in favor of suspension. For example, Johansson relied on Ianelli's suggestion that Bildman had committed financial improprieties although Ianelli never provided any specifics. (Johansson Dep., pp. 627-632). A showing only of negligent investigation or sloppy decision making is insufficient to establish malice. See *Gram v. Liberty Mut. Ins. Co.*, 384 Mass. at 665; *Mathias v. Beatrice Foods*, 23 Mass. App. Ct. 915, 917 (1986).

However, the record also reveals evidence of personal animus between Johansson and Bildman. Astra is correct that an inference that Johansson did not like Bildman, without more, would not warrant the inference that he acted with ill will in seeking Bildman's suspension and termination. See *Alba v. Sampson*, 44 Mass. App. Ct. at 316. Nonetheless, the record reveals that Johansson and Bildman's relationship was severely strained with deep disagreements over both the general direction and daily functioning of Astra U.S.A. In addition, there is evidence that Bildman was instrumental in bringing about the defeat of Johansson's marketing proposal for the Pulmicort Turbuhaler and that on at least one

occasion the two men screamed at each other and nearly came to blows over their differences. This evidence coupled with the fact that Johansson was the chairman of the investigating committee is sufficient evidence from which a jury could conclude that Johansson's votes to suspend and terminate Bildman were based on retaliation or ill will rather than the good of the corporation. See *Draghetti v. Chmielewski*, 416 Mass. at 817 (strained relations between employee and supervisor almost resulting in physical confrontation sufficient evidence to support inference of improper motive); *McNamee v. Jenkins*, 52 Mass. App. Ct. 503, 509 (2001) (evidence that employee harbored resentment toward supervisor because of negative performance evaluations sufficient evidence of improper motive).

Bildman also points to evidence in the record raising an issue of fact with respect to whether the General Conditions applied to CEOs of Astra subsidiaries, and argues that although Johansson knew they did not apply to Bildman he failed to so inform the rest of the Board. (Lasagna Dep., pp. 45-48). Further, although Tully and Joy told Johansson that they had previously investigated several sexual harassment claims against Bildman and found the claims to be without merit, Johansson did not disclose this to the rest of the Directors at the time of the vote to suspend Bildman. This evidence supports an inference that Johansson was more concerned with obtaining Bildman's suspension that with the fairness of the process or accuracy of the result. Accordingly, Johansson is not entitled to summary judgment on Count I of the complaint.

Bildman cites the following facts to establish that Mogren acted for a spiteful, malignant purpose

unrelated to Astra's legitimate corporate interest. First, in his deposition, Mogren could not remember what specific evidence he had seen from either the preliminary investigation or the committee's presentation to the Board to support the allegations of wrongdoing against Bildman. (Mogren Dep. Vol. IV, pp. 279-286). Mogren's failure to recall does not establish that his decision at the time was not based on evidence which was presented to him. Bildman also notes that Mogren relied on Ianelli's statement that he could believe the sexual harassment allegations against Bildman although Ianelli never actually told Mogren that he had seen any misconduct. (Ianelli Dep., pp. 182-193). Again, mere negligence or sloppy decision making is insufficient to establish malice. See *Gram v. Liberty Mut. Ins. Co.*, 384 Mass. at 665; *Mathias v. Beatrice Foods Co.*, 23 Mass. App. Ct. at 917.

However, Bildman also points to evidence which suggests that Mogren was not interested in a fair appraisal of the allegations against him but rather wanted to accomplish a predetermined result. For example, there is a factual dispute in the record with respect to whether the General Conditions applied to CEOs of Astra subsidiaries and whether although Mogren knew they did not apply to Bildman, he failed to so inform the rest of the Board. Similarly, Mogren failed to tell the Board that he had authorized certain landscaping costs, which was important information the outside directors should have had before voting. (Lasagna Dep., pp. 45-48). Further, in September of 1995, Johansson told Bildman that Mogren was angry with Bildman for answering questions about Astra U.S.A. during a visit from Astra AB board members, undermining Mogren's authority with the board and top management. (2/18/00

Bildman Aff. ¶ 17). Other top executives told Bildman that because Mogren was angry with him, it was only a matter of time before he would be forced out of Astra U.S.A. (2/18/00 Bildman Aff. ¶ 18). This evidence coupled with the underlying dispute in the record as to whether the investigation was fair and objective is sufficient evidence from which a jury could conclude that Mogren's votes to suspend and terminate Bildman were based on retaliation or ill will rather than the good of the corporation. See *Draghetti v. Chmielewski*, 416 Mass. at 817; *McNamee v. Jenkins*, 52 Mass. App. Ct. at 509. Accordingly, Mogren is not entitled to summary judgment on Count I of the complaint.

B. Intentional Infliction of Emotional Distress

Count II of Bildman's complaint alleges that Mogren and Johansson are liable for intentional infliction of emotional distress for their conduct in investigating him and terminating his employment. Astra first moves for summary judgment on the ground that such a claim is barred by the exclusivity provision of the Workers' Compensation Act, G.L. c. 152, § 24, which precludes common law actions where the plaintiff is an employee; his condition is a compensable personal injury within the meaning of the Act, and the injury arose out of and in the course of his employment. *Green v. Wyman-Gordon Co.*, 422 Mass. 551, 558 (1996); *Brown v. Nutter, McClennen & Fish*, 45 Mass. App. Ct. 212, 215 (1998). The requirement that the injury arise out of the employment is broadly construed and is satisfied if the injury arises out of the nature, conditions, obligations or incidents of the employment: in other words, the employment looked at in any of its aspects. *Doe v. Purity Supreme,*

Inc., 422 Mass. 563, 566 (1996); *Brown v. Nutter, McClennen & Fish*, 45 Mass. App. Ct. at 215.

Here, Bildman alleges that he suffered emotional distress as a result of the defendants' investigation of his activities and suspension and then termination of his employment. Intentionally inflicted emotional distress is a compensable injury under the Workers' Compensation Act. See G.L. c. 152, § I(7A); *Green v. Wyman-Gordon Co.*, 422 Mass. at 558; *Foley v. Polaroid Corp.*, 381 Mass. 545, 550 (1980); *Brown v. Nutter, McClennen & Fish*, 45 Mass. App. Ct. at 215. Further, the distress suffered by Bildman as a result of the investigation and his termination clearly arose out of his employment as President and CEO of Astra U.S.A. See *Mullen v. Ludlow Hosp. Soc'y*, 32 Mass. App. Ct. 968, 970, *rev. den.*, 413 Mass. 1102 (1992) (emotional distress caused by employee's discharge compensable under G.L. c. 152).

A claim against a fellow employee for commission of an intentional tort is barred by G.L. c. 152, § 24 if committed within the course of the co-worker's employment and in furtherance of the employer's interests. *Doe v. Purity Supreme, Inc.*, 422 Mass. at 565; *Anzalone v. MBTA*, 403 Mass. 119, 124 (1988); *Brown v. Nutter, McClennen & Fish*, 45 Mass. App. Ct. at 216).[11] Although an employee may have more

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[11] There is no support for Bildman's assertion that a corporate director cannot be an employee under the Workers' Compensation Act. The Act defmes "employee" as "every person in the service of another under any contract of hire, express or implied, oral or written" and then enumerates various exceptions. Corporate directors are not expressly excepted from the definition. See G.L. c. 152, § I. See also *Emery's Case*, 271 Mass. 46, 48 (1930) (corporate officer and shareholder can be "employee" under c. 152). Cf. *Ryder's Case*, 341 Mass. 661, 664-665 (1961)

than one motive for performing an act, he is acting in the scope of his employment as long as one significant purpose is related to the employment. *Mendes v. Ng*, 400 Mass. 131, 134-135 (1987). Here, although there is a factual dispute with respect to whether Mogren and Johansson may have been motivated in part by ill will, it is nonetheless clear that their actions in investigating Bildman's alleged misconduct as President and CEO and voting to terminate him were activities within the scope of their duties as Directors of Astra U.S.A. and related to Astra's legitimate interests. Cf. *O'Connell v. Chasdi*, 400 Mass. 686, 690 (1987) (workers' compensation act did not bar intentional infliction of emotional distress claim arising from supervisor's sexual harassment of employee because harassment was in no way related to employer's interests).

Mogren's and Johansson's conduct therefore arose in the course of their employment by Astra and they are immune from tort liability under G.L. c. 152, § 24. See *Anzalone v. META*, 403 Mass. at 122-125 (workers' compensation act bars intentional infliction of emotional distress claim based on supervisor's criticism of plaintiff's performance, assignment of demeaning tasks, violation of light duty order and purposely exacerbating plaintiff's medical condition); *Foley v. Polaroid Corp.*, 381 Mass. at 550 (workers' compensation act bars intentional infliction of emotional distress claim based on investigation of rape allegation against employee, suspension of his position, instigation of criminal charges against him and hostile treatment following his acquittal); *Fusaro v. Blakely*, 40 Mass. App. Ct. 120, 124 (1996) (workers'

(partner is not an "employee" under c. 152 because partnership is not separate legal entity from partners comprising it).

compensation act bars intentional infliction of emotional distress claim against pharmacy security officers who during drug investigation at pharmacy threatened and intimidated employee and attempted to coerce a confession). Accordingly, the individual defendants are entitled to judgment as a matter of law on Count I of the complaint.

Even if Bildman's claim was not barred by the exclusivity provision of the workers' compensation act, he has no reasonable likelihood of establishing such a claim at trial. To prevail on a claim of intentional infliction of emotional distress, the plaintiff must establish that the defendant intended to inflict emotional distress or knew or should have known that such distress was the likely result of his conduct, that the conduct was extreme and outrageous beyond all possible bounds of decency and utterly intolerable in a civilized society, and that the defendant's conduct caused the plaintiff to suffer severe emotional distress of such a nature that no reasonable person could be expected to endure it. *Tetrault v. Mahoney, Hawkes & Goldings*, 425 Mass. 456, 466 (1997); *Agis v. Howard Johnson Co.*, 371 Mass. 140, 145 (1976); *Brown v. Nutter, McClennen & Fish*, 45 Mass. App. Ct. at 218. The mere fact that a defendant acted with tortious intent and that his conduct was characterized by "malice" is not a sufficient predicate for liability for intentional infliction of emotional distress. *Tetrault v. Mahoney, Hawkes & Goldings*, 425 Mass. at 466; *Foley v. Polaroid Corp.*, 400 Mass. 82, 99 (1987).

Viewed in the light most favorable to Bildman, the summary judgment record suggests that Mogren and Johansson, motivated by toward him, voted to terminate his employment following a biased investigation

of allegations raised by others of financial and sexual improprieties. This conduct, although perhaps tortious and in breach of Bildman's employment contract, does not rise to the level of extreme and outrageous conduct beyond all possible bounds of decency and utterly intolerable in a civilized society. See *Foley v. Polaroid Corp.*, 400 Mass. at 100 (employer's conduct in investigating rape allegation against employee, instigating criminal charges against him and treating him hostilely following his acquittal not extreme and outrageous); *Chakrabarti v. Cohen*, 31 F.3d 1, 6 (1st Cir. 1994) (supervisor's conduct in intentionally interfering with staff psychiatrist's employment by misstating facts about his competence, placing him in dead-end job and making procedural missteps in deciding not to renew his clinical privileges not extreme and outrageous as matter of law). Cf. *Bowman v. Heller*, 420 Mass. 517, 520 (1995), *cert. den.*, 516 U.S. 1032 (1996) (jury could find extreme and outrageous employee's conduct of circulating in workplace pornographic pictures superimposed with the face of co-employee who was rival in union election); *Agis v. Howard Johnson Co.*, 371 Mass. at 141, 145 (jury could find extreme and outrageous employer's conduct in firing employees in alphabetical order until someone confessed to workplace theft); *Brown v. Nutter, McClennen & Fish*, 45 Mass. App. Ct. at 219 (jury could find extreme and outrageous employer's conduct in compelling secretary through tears and threats of suicide to commit forgery for his personal benefit); *Ruffino v. State Street Bank & Trust Co.*, 908 F. Supp. 1019, 1050 (D. Mass. 1995) (jury could find extreme and outrageous vice-president's conduct in sexually harassing employee and retaliating against her after she filed a grievance).

Bildman contends that in terminating him, the defendants "vilified him" and "took steps to maximize [his] shame in the eyes of co-workers." See *Conway v. Smerling*, 37 Mass. App. Ct. 1, 9(1994). However, as discussed above, the overwhelming majority of the public statements made by the defendants in connection with the investigation and termination were privileged. Accordingly, this Court concludes that Bildman has no reasonable expectation of establishing intentional infliction of emotional distress at trial. Thus the individual defendants are entitled to judgment as a matter of law on Count II of the complaint.

V. Bildman's Motion for Partial Summary Judgment on Counts I, III and V of Astra's Complaint

Finally, Bildman moves for partial summary judgment on Count I of Astra's complaint alleging fraud, Count III alleging waste of corporate assets and Count V alleging conversion insofar as these counts are premised on expenses associated with marketing and sales conferences at the New Seabury Resort and Conference Center in Cape Cod from 1993 to 1995, expenses associated with yacht trips in connection with marketing and sales conferences in Florida from 1992 through 1995, personal vacations and meals at restaurants, use of a travel agency to overcharge Astra for personal expenses and use of German contractors to charge Astra for work done on Badman's homes. Bildman contends that the summary judgment record demonstrates as a matter of law that he did not commit any wrongdoing in connection with these particular allegations.

Bildman first contends that there is no genuine issue of material fact with respect to the propriety of the 1993, 1994 and 1995 New Seabury management

conferences. 11e points to evidence in the summary judgment record that as President and CEO of Astra U.S.A., he had authority to incur travel and entertainment expenses within his sole discretion as long as they were within budget and promoted some business purpose. See, e.g., 7/30/01 Bildman Affidavit ¶ 9; Sjostrand Affidavit ¶¶ 6-8; Broere Affidavit ¶ 9. There is also evidence that the New Seabury management conferences served a legitimate business purpose, that Astra business was discussed there and that the participation of wives and children at the conferences promoted Astra's business interests. See, e.g., 5/11/98 Bildman Affidavit ¶¶ 5-6; 6/30/01 Bildman Affidavit ¶¶ 1-5; Wadsworth Deposition, pp. 3-6; Miller Deposition, p. 82; 7/25/01 Testen Affidavit ¶¶ 4-6.

However, Astra has produced evidence that the New Seabury trips violated the Employee Expense Policy, lacked the normal indicia of business trips such as reserved conference rooms, rented audiovisual equipment and business agendas and were essentially personal vacations in which little or no business was discussed. See, e.g., Ex. 31 to Bildman Deposition; Yon Deposition, p. 149; 4/15101 Testen Affidavit ¶¶ 7-9; Boudreau Dep., pp. 62-63; Miller Deposition, pp. 68-70. There is also evidence that Shirley Miller, who organized the conferences, was told by Solvell not to discuss the details of the conferences with anyone and to send accounts payable an invoice stating only the total charge for the conferences, but not any supporting documentation. Miller Deposition, pp. 72-74. Accordingly, there is a factual dispute with respect to the propriety of the New Seabury conferences and Bildman is not entitled to judgment as a matter of law.

Bildman next contends that there is no genuine issue of material fact with respect to the propriety of the yacht trips taken during Florida marketing conferences, pointing to evidence in the record that the yacht trips were planned to entertain Astra AB executives and that while on such trips, the participants discussed Astra business, including the launch of the Pulmicort Turbuhaler. See, e.g., 6/30/01 Badman Affidavit ¶¶ 6-7. There is also evidence in the record that the hiring of female "escorts" to entertain Astra visiting executives was a common practice. See e.g., Aarons Deposition, pp. 541-558. However, Astra has proffered evidence to the contrary that the yacht trips and hiring of "escorts" violated the Employee Expense Policy, that the expense reports for these activities were altered to disguise the nature of the activities and that these activities were undertaken for personal pleasure. See, e.g., Ex. 31 to Bildman Deposition; Yon Deposition, p. 149; Aarons Grand Jury Transcript, pp. 13-16, 21-23; Solvell Grand Jury Transcript, pp. 8-15. Bildman therefore is not entitled to judgment as a matter of law with respect to these activities.

Bildman next contends that Astra has no evidence to support its allegations of wrongdoing in connection with restaurant arrangements in New Seabury and travel arrangements made through CareFree Travel. He points to evidence in the record that he never instructed restaurant owners at Regatta Falmouth or Regatta Cotuit to overcharge or overbill Astra to create excess balances to be used for personal dinners or parties for him. See 6/20/01 Bildman Affidavit ¶¶ 10. However, Astra has introduced evidence that at Bildman's request, arrangements were made at these two restaurants to have all meals by him and his family charged to Astra's account. See Ex. 40

to Miller Deposition; Miller Deposition, pp. 63. As discussed above, there is a factual dispute in the summary judgment record as to whether this was permissible under Astra policy.

Bildman also points to evidence that he never instructed CareFree Travel to bill Astra for his personal or family vacations, nor did he instruct CareFree to overcharge Astra for company services in order to create excess balances to be used for personal vacations. See, e.g., 6/20/01 Bildman Affidavit ¶ 11; Dibenedetto Affidavit ¶¶ 1-5. However, Astra has presented evidence that it was billed for "Pre-President's Club" trips, trips immediately before "President's Club" trips to reward top sales representatives, which were in fact vacations for Bildman and his family and friends involving recreational activities not business. See, e.g., Bildman Deposition, Vol.1, pp. 1018-1021; Solvell Deposition, Vol. V, pp. 835-839; Wadsworth Deposition, Vol. I, pp. 122-129. In addition, although CareFree arranged numerous personal vacations for the Bildmans, it never billed them for any of these trips until after Bildman was suspended as CEO and President of Astra U.S.A. See Wadsworth Deposition, Vol. I, pp. 124-127. Accordingly, there is a factual dispute in the record with respect to the propriety of Bildman's vacations, precluding summary judgment.

Finally, Bildman contends that Astra has no evidence to support its allegation that German contractors improperly charged Astra for work done on his homes. He points to evidence that he was billed and paid German woodworking firm Eckart, Gmbh for goods and services provided at his homes and that he never instructed Eckart to charge Astra for any work related to his homes. See 6/30/01

Bildman Affidavit ¶ 8. Similarly, he was billed and paid for all goods and services provided by German stoneworking firm C&N Dankert Naturstein Gmbh and never instructed Dankert to charge Astra for any work related to his homes. See 6/30/01 Bildman Affidavit ¶ 9. However, Astra has proffered evidence that although Eckart and Dankert performed $300,000 to $500,000 of work on Bildman's residence at 99 Sargeant Road, Bildman has been unable in response to discovery requests to produce any evidence that he paid for such work. See, e.g., Wadsworth Deposition, pp. 103-104; McDonald Deposition, pp. 161-172. Further, there is evidence in the record that Bildman made himself the project manager for Astra construction projects involving the RX office and cafeteria and then billed work performed on his homes to these projects. See, e.g., Kennedy Deposition Vol. II, pp. 225-228; 258-260; Exhibits 43, 64 to Kennedy Deposition; Noyes Deposition, pp. 230, 296. Accordingly, there is a factual dispute in the record with respect to whether Bildman authorized German contractors to charge Astra improperly for work done on his homes.

ORDER

For the foregoing reasons, with respect to Civil Action No. 98-0580-C, it is hereby ORDERED that Astra's motion for summary judgment on Bildman's counterclaim is ALLOWED as to Counts IV, VI and VII and DENIED as to Counts I, II and III. It is further ORDERED that Bildman's cross-motion for summary judgment on Count I of his counterclaim is DENIED. Finally, it is ORDERED that Astra's motion for summary judgment on Count II of its complaint is DENIED and that Bildman's cross-

motion for partial summary judgment on Counts I, II, III and V of Astra's complaint is DENIED.

With respect to Civil Action No. 99-1942-G, it is hereby ORDERED that Mogren and Johanssons' motion for summary judgment are DENIED as to Count I of the complaint and ALLOWED as to Count II.

/s/ Margaret R. Hinkle
Margaret R. Hinkle
Justice of the Superior Court

DATED: October 29, 2001

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, ss.

SUPERIOR COURT CIVIL ACTIONS
No. 98-0580C & 99-1942G

ASTRA U.S.A., INC.

vs.

LARS P.E. BILDMAN,

vs.

HAKAN MOGREN and CARL - GUSTAF JOHANSSON

QUESTIONS FOR THE JURY

I. CLAIMS OF ASTRA U.S.A. INC., (hereafter referred to as "Astra") AGAINST LARS P.E. BILDMAN (hereafter referred to as "Mr. Bildman")

A. FRAUD

Q.1. Did Mr. Bildman defraud Astra?

YES ✓ NO ____

Q.2. If your answer to the preceding question is "Yes", what are the damages to which Astra is entitled as a result of Mr. Bildman's conduct?

$ 875,512
AMOUNT IN NUMBERS

eight hundred seventy-five thousand five hundred twelve Dollars
AMOUNT IN WORDS

B. CONVERSION

Q.3. Did Mr. Bildman convert Astra funds for his personal benefit?

YES ✓ NO ___

Q.4. If your answer to the preceding question is "Yes", what are the damages to which Astra is entitled as a result of Mr. Bildman's conduct?

$ 875,512
AMOUNT IN NUMBERS

eight hundred seventy-five thousand five hundred twelve Dollars
AMOUNT IN WORDS

C. WASTE

Q.5. Did Mr. Bildman waste the assets of Astra?

YES ✓ NO ___

Q.6. If your answer to the preceding question is "Yes", what are the damages to which Astra is entitled as a result of Mr. Bildman's conduct?

$ 1,040,812
AMOUNT IN NUMBERS

One million forty thousand eight hundred twelve Dollars
AMOUNT IN WORDS

D. BREACH OF FIDUCIARY DUTY

Q.7. Did Mr. Bildman breach his fiduciary duty to Astra by making affirmative misrepresentation or failing to disclose to Astra material information which he had a duty to disclose?

YES ✓ NO ___

Q.8. If your answer to the preceding question is "Yes", was Mr. Bildman's conduct a substantial factor in causing harm to Astra?

YES ✓ NO ____

Q.9. Did Mr. Bildman breach his fiduciary duty to Astra by improper use of Astra funds?

YES ✓ NO ____

Q.10. If your answer to the preceding question-is "Yes", was Mr. Bildman's conduct a substantial factor in causing harm to Astra?

YES ✓ NO ____

Q.11. If your answer to either or both questions 8 and 10 is "Yes", what are the damages to which Astra is entitled as a result of Mr. Bildman's breach of fiduciary duty?

$ 1,040,812
AMOUNT IN NUMBERS

One million forty thousand eight hundred twelve Dollars
AMOUNT IN WORDS

Q.12. If you answered any two or more of questions 2, 4, 6 or 11, have you overlapped any damages you awarded Astra?

YES ✓ NO ____

Q.13. If your answer to the preceding question is "Yes", set forth the damages Astra is entitled to without any overlapping.

$ 1,040,812
AMOUNT IN NUMBERS

One million forty thousand eight hundred twelve Dollars
AMOUNT IN WORDS

MISCELLANEOUS

Q.14. Did Mr. Bildman engage in sexual harassment at Astra?

YES ✓ NO ____

Q.14A. Did Mr. Bildman violate Astra's sexual harassment policy?

YES ✓ NO ____

Q.15. Did Mr. Bildman retaliate against any Astra employee who exercised his/her right to make a complaint under Astra's sexual harassment policy?

YES ✓ NO ____

II. CLAIM OF MR. BILDMAN AGAINST ASTRA

BREACH OF CONTRACT

Q.16. Did Astra breach the 1993 employment agreement in its termination of Mr. Bildman?

YES ____ NO ✓

Q.17. If the answer to the preceding question is "No", did Astra breach the 1993 employment agreement with regard to the profit sharing plan?

YES ____ NO ✓

Q.18. If your answer to question 16 or 17 is "Yes", what are the damages to which Mr. Bildman is entitled as a result of Astra's breach of contract?

$ 0
AMOUNT IN NUMBERS

_____ Dollars
AMOUNT IN WORDS

Q.19. At the time Astra terminated Mr. Bildman, did Astra have a reasonable good faith basis for believing Mr. Bildman had engaged in conduct justifying his termination "for cause" under the 1993 employment contract?

YES ✓ NO ____

Q.20. Did Mr. Bildman fraudulently induce Astra to enter into the March 1996 supplemental stock grant?

YES ____ NO ✓

Q.21. If your answer to the preceding question is "No", what amount of money is owed Mr. Bildman tinder the March 1996 supplemental stock grant?

$ 203,691
AMOUNT IN NUMBERS

two hundred three thousand six hundred ninety-one Dollars
AMOUNT IN WORDS

III. CLAIMS OF MR. BILDMAN AGAINST HAKAN MOGREN (hereafter referred to as "Dr. Mogren") & CARL-GUSTAF JOHANSSON (hereafter referred to as "Mr. Johansson")

INTENTIONAL INTERFERENCE WITH CONTRACT

Q.22. Did Dr. Mogren intentionally interfere with Mr. Bildman's employment contract with Astra?

YES ____ NO ✓

Q.23. If your answer to the preceding question is "Yes", what are the damages to which Mr. Bildman is entitled as a result of Dr. Mogren's conduct?

$_____
AMOUNT IN NUMBERS

_____Dollars
AMOUNT IN WORDS

Q.24. Did Mr. Johansson intentionally interfere with Mr. Bildman's employment contract with Astra?

YES ____ NO ✓

Q.25. If your answer to the preceding question is "Yes", what are the damages to which Mr. Wildman is entitled as a result of Mr. Johansson's conduct?

$_____
AMOUNT IN NUMBERS

_____Dollars
AMOUNT IN WORDS

I hereby certify that each question answered above was answered by at least 5/6 of the deliberating jurors.

/s/ Kaja K. Schuppert
Foreman

DATED: February 21, 2002

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS.

[Filed January 8, 2010]

SUPERIOR COURT DEPARTMENT OF
THE TRIAL COURT [CONSOLIDATED]
(Specially Assigned to Hinkle, J.)
C.A. No. 98-0580-C

ASTRA USA, INC.,
Plaintiff,

v.

LARS BILDMAN,
Defendant,

v.

HAKAN MOGREN, and CARL-GUSTAF JOHANSSON,
Third-Party Defendants,

C.A. No. 99-1942-G

LARS BILDMAN,
Plaintiff,

v.

HAKAN MOGREN, and CARL-GUSTAF JOHANSSON,
Defendants.

FINAL JUDGMENT AFTER RESCRIPT

These consolidated actions, having been tried before a jury, which duly delivered its verdict on special

questions, and the Court having rendered various pre-verdict and post-verdict orders, was appealed to the Supreme Judicial Court. The issues having been duly heard and the Supreme Judicial Court having issued a rescript, it is hereby Ordered and Adjudged that Final Judgment After Rescript shall enter in these consolidated cases as follows:

I. Liability On Claims, Counterclaims and Third-Party Claims

A. Plaintiff Astra USA, Inc.'s Claims Against Defendant Bildman (C.A. 98-0580).

1. Count I (Fraud) – Judgment shall enter in favor of Astra USA. Inc. ("Astra").

2. Count II (Breach of Fiduciary Duty and the Duties of Good Faith and Loyalty) – Judgment shall enter in favor of Astra.

3. Count III (Waste of Corporate Assets) – Judgment shall enter in favor of Astra.

4. Count IV (Rescission) – Judgment shall enter in favor of Lars Bildman.

5. Count V (Conversion) – Judgment shall enter in favor of Astra.

B. Plaintiff-In-Counterclaim Lars Bildman's Claims Against Defendant-In-Counterclaim Astra USA, Inc. (C.A. 98-0580).

7. Count I (Breach of Contract) – Judgment shall enter in favor of Astra.

8. Count II (Fair Wage Practices) – Judgment shall enter in favor of Astra.

9. Count III (Indemnification for Cost and Expenses Incurred in this Action) – Judgment shall enter in favor of Astra.

10. Count IV (Indemnification for Costs and Expenses Incurred in Defending Criminal Action) – Judgment shall enter in favor of Astra.

11. Count V (Libel-Malice) – Judgment shall enter in favor of Astra.

12. Count VI (Libel-Negligence) – Judgment shall enter in favor of Astra.

13. Count VII (Libel-Per Se) – Judgment shall enter in favor of Astra.

C. Third-Party Plaintiff Lars Bildman's Claims Against Third-Party Defendants Häkan Mogren and Carl-Gustaf Johansson (C.A. 98-0580).

14. Count V (Libel-Malice) – Judgment shall enter in favor of Häkan Mogren and Carl-Gustaf Johansson.

15. Count VI (Libel-Negligence) – Judgment shall enter in favor of Häkan Mogren and Carl-Gustaf Johansson.

16. Count VII (Libel-Per Se) – Judgment shall enter in favor of Häkan Mogren and Carl-Gustaf Johansson.

D. Third-Party Plaintiff Lars Bildman's Claims Against Third-Party Defendant Astra AB (C.A. 98-0580).

17. Count I (Breach of Contract) – Judgment shall enter in favor of Astra AB.

18. Count II (Fair Wage Practices) – Judgment shall enter in favor of AB.

19. Count III (Indemnification for Cost and Expenses Incurred in this Action) – Judgment shall enter in favor of Astra AB.

20. Count IV (Indemnification for Costs and Expenses incurred in Defending Criminal Action) – Judgment shall enter in favor of Astra AB.

21. Count V (Libel-Malice) – Judgment shall enter in favor of Astra AB.

22. Count VI (Libel-Negligence). – Judgment shall enter in favor of Astra AB.

23. Count VII (Libel-Per Se) – Judgment shall enter in favor of Astra AB.

E. Plaintiff Lars Bildman's Claims Against Häkan Mogren and Carl Gustaf Johansson (CA. 994942).

24. Count I (Intentional Interference with Contractual Relations) – Judgment shall enter in favor of Hakan Mogren and Carl-Gustaf Johansson.

25. Count II (Intentional Infliction of Emotional Distress) – Judgment shall enter in favor of Häkan Mogren and Carl-Gustaf Johansson.

II. Damages And Equitable Relief

A. Supplemental Stock Grant

26. Judgment shall enter that Lars Bildman is entitled to recover from Astra the

amount of $203,691 under the March 1996 supplemental stock grant, subject to and limited by Astra's right of set-off discussed in § II(D) below.

B. Legal Fees

27. Judgment shall enter that Lars Bildman is not entitled to any of his legal fees, costs, or expenses in connection with these consolidated actions.

C. Award of Damages In Favor Of Astra And Against Lars Bildman

28. Mr. Bildman shall pay Astra the damages awarded by the jury in the amount of $1,040,812.00, plus interest at the rate of 12% per annum from the date of the filing of this action on February 4, 1998.

29. Mr. Bildman shall forfeit the amount of $5,599,097 in compensation and $1,180,000 in bonuses paid to him during his employment by Astra. Accordingly, Mr. Bildman shall also pay Astra an additional $6,779,097.00, plus interest at the rate of 12% per annum from the date of the filing of this action on February 4, 1998.

30. Judgment shall enter in favor of Lars Bildman on Astra's claims for punitive damages, investigatory costs, and additional compensatory damages.

D. Set-Off

31. Judgment shall enter that Astra may set off $203,691, the amount that Lars

Bildman is entitled to recover from Astra under the March 1996 supplemental stock grant, from the $7,819,909 in total damages that Astra is entitled to recover from Lars Bildman, as discussed in § II(C) above.

32. As a result of this set-off, judgment shall enter that Mr. Bildman shall pay Astra $7,616,218, plus interest at the rate of 12% per annum from the date of the filing of this action on February 4, 1998 through January 4, 2010 in the amount of $10,875,959.30, totaling $18,492,177.30, with interest continuing to accrue at the rate of 12% per annum through and until the date of Mr. Bildman's full payment of this judgment.

So Ordered:

Dated at Boston, Suffolk County, this 6 day of January 2010.

/s/ Margaret R. Hinkle
By: , Asst. Clerk
Associate Justice

Entered on the Docket: January 8, 2010